(22,332.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 711.

T. L. ROUGHTON, PLAINTIFF IN ERROR,

vs.

HARRY L. KNIGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

T. L. ROUGHTON,
Plaintiff and Apellant in Error,
vs.
HARRY L. KNIGHT,
Defendant and Appellee in Error.

2 PETITION FOR WRIT OF ERROR.

To the Honorable Chief Justice of the Supreme Court of the State of California:

T. L. ROUGHTON, finding himself aggrieved by the final judgment of this Court made and entered on the 11th day of August, 1909, on his appeal from the judgment made and entered against him in the Superior Court of the State of California, in and for the County of Kern, wherein
3 said T. L. Roughton was plaintiff and Harry L. Knight was defendant, and wherein was drawn in question the validity of a treaty or statute or authority or right exercised by petitioner under the Constitution and laws of the United States and especially under that certain Act passed by Congress on the 4th day of June, 1897, and known as the "Forest Lieu Act," petitions this Honorable Court for a Writ of Error.

That this Court affirmed the said judgment

of the said Superior Court of the State of California, in and for the County of Kern (as made and entered therein against your petitioner on the 24th day of March, 1908) and in doing so passed upon a Federal question, to-wit:

The validity of said Forest Lieu Act, the right to select lieu land under said Act and the right of petitioner to select lieu land under said Act.

That this Court decided said case upon said Federal question and upon no other grounds.

In petitioning this Honorable Court for a Writ of Error, your petitioner claims the right to remove said judgment made and entered in this cause by this Court to the Supreme Court of the United States by a Writ of Error, under Section 709 of the Revised Statutes of the United States, for correction, on the ground that there was drawn in question the construction of said Forest Lieu Act and the rights herein mentioned and those exercised under said Act by your petitioner, and all because the construction placed upon said Act by said Superior Court and this Court was against the right given to your petitioner and all other persons owning land situated within a forest reserve who deeded the same to the United States to select in lieu thereof other public land as provided by said Forest Lieu Act.

That your petitioner, because of the steps taken

by him under said Forest Lieu Act (as herein mentioned and alleged) claims to own all right, title and interest in and to that certain real property described as follows, to-wit:

The southeast quarter of section twelve (12) in township twenty-nine (29) south, range twenty-five (25) east, Mount Diablo Base and Meridian, situated in the County of Kern, State of California, and all within Visalia, California, Land District, and containing one hundred and sixty (160) acres.

That your petitioner, pursuant to the provisions of said Forest Lieu Act, did on the 8th day of June, 1899, duly execute and acknowledge his deed relinquishing and conveying to the United States all his right, title and interest in and to that certain property (acquired by him by a duly issued patent from the United States) situated in the Sierra Forest Reserve in the State of California and described as follows, to-wit:

The northeast quarter of section thirty-five (35) in township nine (9) south, range twenty-four (24) east, Mount Diablo Base and Meridian, situated within the County of Fresno, State of California, and containing one hundred and sixty (160) acres.

That said deed was in all things as required by

10 law and the rules and regulations of the interior department.

That pursuant to the requirements of said Act, your petitioner on June 10th, 1899, caused said deed to be duly recorded in the office of the County Recorder of Fresno County, State of California, in Book 226 of Deeds at page 315 (the county in which said property so deeded is situated).

That thereafter and on the 19th day of June,
11 1899, your petitioner duly delivered said deed, accompanied by a duly certified complete abstract of title, showing title from the United States to your petitioner and from your petitioner back again to the United States by said deed, free and clear of all incumbrances, to the Register and Receiver of the United States Land Office at Visalia, California, being the Land Office in the district in which said property so deeded is situated.

12 That said Register and Receiver of said Land Office duly received said deed and said abstract of title and duly filed the same in said Land Office and thereafter duly forwarded the same to the Commissioner of the United States Land Office at Washington, D. C.

That said United States is now and ever since the execution, recording, delivery and filing of said deed to the United States, as herein mentioned, has been the owner in fee and in possession

of said property so deeded as aforesaid. That the title to said property so deeded to the United States now does and ever since the recording of said deed has stood of record in said Recorder's Office and in said Land Office in the name of the United States.

That your petitioner, after recording said deed with said County Recorder and filing the same, as hereinbefore mentioned, did duly select and file his selection in writing with the Register and Receiver of the United States Land Office at Visalia, California, selecting in lieu of the said property relinquished to the United States the property herein first above described, which said property, at the time of said selection, was a tract of Government land open to settlement and situated in the State of California and within the Visalia, California, Land District, and was vacant, surveyed, non-mineral public land of the United States of America, subject to homestead entry under the homestead laws of the United States of America and said land so selected did not exceed in area the tract of land conveyed by said deed of relinquishment to the United States.

That your petitioner has not received any land in lieu of or in exchange for the land so conveyed to the United States by said deed of relinquishment other than was obtained by the selection herein mentioned.

16 That your petitioner claims to own the land hereinabove first described and all because of the facts herein alleged.

That said claim made by your petitioner was denied by the Superior Court of the State of California, in and for the County of Kern, and by this Court on the 11th day of August, 1909, in affirming the judgment of said Superior Court, all as appears from the records of this Court.

17 That this Court in affirming the judgment of said Superior Court decided that your petitioner did not take or obtain by recording said deed, and the filing of the same with the Register and Receiver of the United States Land Office at Visalia, California, together with said abstract of title, a vested right to select in lieu of said property deeded to the United States the property herein selected, or any other property; thereby denying to your petitioner a right which he exercised and claimed, and does now claim under said For-
18 est Lieu Act and the Constitution and laws of the United States, and the Fourteenth Amendment thereto, all of which fully appears from said record.

WHEREFORE, Your petitioner prays for a Writ of Error to the Supreme Court of the United States, and your petitioner will ever pray, etc.

T. L. ROUGHTON, Petitioner.
E. O. MILLER,
W. H. MORRISSEY,
Attorneys for Plaintiff in Error.

Endorsed:
Filed August 11, 1910.
FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

Let the Writ issue as prayed for upon petitioner filing a bond in the sum of five hundred dollars with sufficient surety with the Clerk of this Court.
Done and dated this 11th day of August, 1910.

W. H. BEATTY,
Chief Justice, Supreme Court, State of California.

Endorsed:
Filed August 11, 1910.
FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

T. L. ROUGHTON,
Plaintiff and Appellant in Error,
vs.
HARRY L. KNIGHT,
Defendant and Appellee in Error.

The record from page 31 to 46 inclusive herein is assigned and referred to as a preface to the Assignment of error.

ASSIGNMENT OF ERROR.

On the 1st day of June, 1899, petitioner owned

a tract of land situated in the Sierra Forest Reserve in the State of California, described as follows, to-wit:

> The northeast quarter of section thirty-five (35), in township nine (9) south, range twenty-four (24) east, Mount Diablo Base and Meridian, situated within the County of Fresno, State of California, and containing one hundred and sixty (160) acres.

and acquired the same from the United States by a patent duly issued and by his deed, duly executed, reconveyed the same to the United States and caused his said deed to be duly recorded on the 10th day of June, 1899, in the office of the County Recorder of Fresno County (the county in which said property is situated) in Book 226, page 315, of Deeds of said County and thereafter and on the 19th day of June, 1899, duly delivered said deed to the Register and Receiver of the United States Land Office at Visalia, California (the land office in the district in which said property is situated), together with a complete abstract of title, duly certified to, showing title from the United States to petitioner by patent and from petitioner back again to the United States, by said deed free and clear of all liens and incumbrances, and said Register and Receiver duly filed said deed in said Land Office and thereafter duly forwarded the same to the Commis-

sioner of the United States Land Office at Washington, D. C.

Petitioner in deeding said property did in all things fully comply with all the terms of that certain Act passed by Congress on June 4th, 1897, and the Amendments thereto, and known as the "Forest Lieu Act," and the requirements and rules and regulations of the Land Department of the United States, and in so doing acquired a vested property right to select in lieu of said land so deeded to the United States other vacant, surveyed, non-mineral, public land of the United States, subject to homestead entry under the homestead laws of the United States of America of the same area, to-wit, one hundred and sixty (160) acres.

(a) The Superior Court of the State of California in and for the County of Kern and this Court erred in holding that petitioner did not acquire by deeding said property to the United States, under said Forest Lieu Act, *a vested* (property) *right to select* in lieu of said land so deeded to the United States other vacant, surveyed, non-mineral, public land of the United States of America, subject to homestead entry under the homestead laws of the United States of America.

(b) That certain land, described as follows, to-wit:

The southeast quarter of section twelve (12), in township twenty-nine (29) south, range twenty-five (25) east, Mount Diablo Base and Meridian, situated in the County of Kern, State of California, and all within Visalia, California, Land District and containing one hundred and sixty (160) acres.

being vacant, surveyed, non-mineral public land of the United States, subject to homestead entry, under the homestead laws of the United States of America at the time of the execution, recordation and filing of petitioner's deed to the United States (as hereinbefore mentioned), petitioner while said land was vacant, surveyed, non-mineral public land of the United States, subject to homestead entry under the homestead laws of the United States of America, duly selected the same in writing in lieu of the land he deeded to the United States (herein first above described), and filed his selection with said Register and Receiver of said United States Land Office at Visalia, California.

The Superior Court of the State of California, in and for the County of Kern, and this Court erred in holding that petitioner did not have the right, under said Forest Lieu Act, to select the said property (last-above described) in lieu of the land petitioner deeded to the United States.

(c) That by the construction placed on said

31 Forest Lieu Act said Superior Court and this Court deprived and took from petitioner a vested property right, to-wit:

A right by him acquired by deeding his said property to the United States to select in lieu thereof a tract of vacant, surveyed, non-mineral public land of the United States of America, subject to homestead entry, under the homestead laws of the United States of America; a right ac-
32 quired by petitioner under said Forest Lieu Act and the Constitution and laws of the United States and the Fourteenth Amendment thereto, and all without consideration and without the United States reconveying to him said property deeded to it.

E. O. MILLER,
W. H. MORRISSEY,
Attorneys for Plaintiff in Error.

Endorsed:
33 Filed August 11, 1910.
FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

IN THE SUPREME COURT OF THE UNITED STATES.

PRAYER FOR WRIT.

To the Honorable, the Supreme Court of the United States:

And now comes T. L. ROUGHTON, the plaintiff

in error above-named, and prays for a reversal of the judgment of the Superior Court of the State of California in and for the County of Kern, in the action brought by plaintiff against defendant, which said judgment was made and entered by said Superior Court on the 24th day of March, 1908;

And petitioner also prays for a reversal of the judgment of affirmance of the said judgment of the said Superior Court in said action by the Supreme Court of the State of California made and entered in said Supreme Court on the 11th day of August, 1909.

E. O. MILLER,
W. H. MORRISSEY,
Attorneys for Petitioner.

Endorsed:

Filed August 11, 1910.
FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

IN THE SUPREME COURT OF THE UNITED STATES.

T. L. ROUGHTON,
Plaintiff and Appellant in Error,
vs.
HARRY L. KNIGHT,
Defendant and Appellee in Error.

KNOW ALL MEN BY THESE PRESENTS:

That T. L. ROUGHTON, as principal, and W. H. MORRISSEY and SAMUEL CROZIER, of the City and County of San Francisco, State of California, as sureties, are held and firmly bound unto the above-named defendant in the sum of five hundred ($500.00) dollars to be paid to him, and for the payment of which well and truly to be made, we bind ourselves, and each of us, to him and each of his heirs, executors and administrators jointly and severally firmly by these presents, sealed with our seals and dated this 17th day of August, A. D. 1910;

WHEREAS, the above-named plaintiff in error seeks to prosecute a Writ of Error in the Supreme Court of the United States to reserve the judgment and decree rendered in the above-entitled action by the Supreme Court of the State of California;

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his Writ of Error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

W. H. MORRISSEY. (Seal.)
SAMUEL CROZIER. (Seal.)

39 STATE OF CALIFORNIA,
City and County of San Francisco—ss.

W. H. MORRISSEY and SAMUEL CROZIER, whose names are subscribed as sureties to the above bond, being severally duly sworn, each for himself, says that he is a resident and householder of the State of Cailfornia and is worth more than the sum in said bond specified as the penalty thereof over and above all his just debts
40 and liabilities in property not by law exempt from execution in this State.

W. H. MORRISSEY.
SAMUEL CROZIER.

Subscribed and sworn to before me this 17th day of August, A. D. 1910.

(SEAL) R. B. TREAT,
Notary Public in and for the City and
41 County of San Francisco, State of California.

This bond approved this 17th day of August, 1910. W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed:
Filed August 17th, 1910.

FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

42 IN THE SUPREME COURT OF THE UNITED STATES.

T. L. ROUGHTON,
Plaintiff and Appellant in Error,
vs.
HARRY L. KNIGHT,
Defendant and Appellee in Error.

WRIT OF ERROR.

43 United States of America—ss.

The President of the United States of America to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the State of California, and the Supreme Court of the State of California, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment of a plea, which is
44 in the Supreme Court of the State of California, before you, or some of you, being the highest Court of law or equity of said State in which a decision could be had in the said suit between T. L. Roughton, plaintiff and appellant, against Harry L. Knight, defendant and respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an au-

45 thority exercised under, said State on the ground of there being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of their validity; or whereas was drawn in question a construction of a clause of the Constitution or treaty or statute—that certain Act passed by Congress on the 4th day of June, 1897, and amendments thereto, and known as the "Forest Lieu Act," and that certain Act passed by Congress March 3, 1905, repealing that
46 part of said Forest Lieu Act relative to selecting lieu lands in exchange of, or commission held under the United States and the decision was against the right, privilege or exemptions specially set up or claimed under such clause of such Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of said T. L. Roughton, as by his complaint appears.

47 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in that behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly sending the records and proceedings, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington, D. C., on the 10th day of October next, in the said Supreme Court of the United States, at a ses-

48 sion thereof to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable Jno. M. Harlan, Senior Associate Justice of the said Supreme Court of the United States, the 17th day of August, in the year of our Lord one thousand nine hundred
49 and ten and of our Independence the 135th.

SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the U. S. in and for the Northern District of the State of California.

By W. B. MALING, Deputy Clerk.

Allowed:

W. H. BEATTY,
Chief Justice, Supreme Court of the State of California.

50 Endorsed:
Filed August 17th, 1910.
FRANK L. CAUGHEY, Clerk.
By ISADOR ERB, Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

T. L. ROUGHTON,
Plaintiff and Apellant in Error,
vs.
HARRY L. KNIGHT,
Defendant and Appellee in Error.

51 CITATION.

United States of America—ss.

To Harry L. Knight, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of California, wherein
52 T. L. Roughton is plaintiff and appellant in error and you are defendant and appellee in error, to show cause, if any there be, why the judgment rendered against the said appellant in error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Dated August 18th, 1910.

W. H. BEATTY,
Chief Justice of the Supreme Court of the
53 State of California.

I, Geo. E. Whitaker, Attorney of record for Harry L. Knight, Appellee in Error in the above-entitled cause, hereby acknowledges due service of the above Citation, Petition for Writ of Error, Assignment of Errors, Prayer, Bond and Writ of Error and enters appearance for Appellee in Error in the Supreme Court of the United States.

....
Attorney for Appellee in Error.

60 JUDGMENT—SUPREME COURT OF CALIFORNIA.

L. A. No. 2264. In Bank. August 11, 1909.

T. L. ROUGHTON, Plaintiff and Appellant *v.* HARRY L. KNIGHT, Defendant and Respondent.

Appeal from the Superior Court of Kern County —Paul W. Bennett, Judge.

61 For Appellant—Hannah & Miller and Rowen Irwin; Maurice E. Power, *amicus curiae.*

For Respondent—Geo. E. Whitaker.

According to the allegations of his complaint appellant owned 160 acres within a forest reservation. Desiring to exchange it for vacant public land of like extent, belonging to the United States, he sought to avail himself of the provisions of the act of Congress approved June 4, 1897, commonly
62 known as the "Forest Lieu Act." This act, so far as it pertains to the case here discussed, is as follows:

"That in the cases in which a tract covered by a patent is included within the limits of a public forest reservation . . . the owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his . . . patent;

63 and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; . . ."

After the passage of the "Forest Lieu Act" the secretary of the interior promulgated a regulation by which the person contemplating an exchange under the terms of said statute was required to execute a quitclaim deed of his property within the forest reservation to the United States; to re-
64 cord said deed; and to furnish an abstract showing a chain of title from the government back again to the United States. It is averred in the complaint that on June 10, 1899, appellant recorded a deed of his property made in pursuance of the "Forest Lieu Act" and the regulation of the interior department to which reference has just been made; that on June 19, 1899, said deed and an abstract showing perfect title in the grantor were
65 filed in the United States land office at Visalia; that these documents were duly forwarded and received by the commissioner of the general land office about June 25, 1899; that they were held in the commissioner's office until January 3, 1905, when they were returned to appellant; but that during the time of the retention of the deed and abstract no objection was made by the commissioner or anyone else to their form or sufficiency. The complaint contains the further averment that on March 14, 1905, appellant filed in the land office at

66 Visalia his application in writing whereby he sought to select the land with reference to which this litigation is conducted; that this application was accompanied by the deed and abstract of title above mentioned; but that nevertheless the United States of America, disregarding appellant's rights, on or about November 15, 1907, issued and delivered its patent conveying to respondent the legal title to the land thus chosen by appellant in lieu of his property in the forest reservation.
67 There is also a statement in the complaint that defendant at all times had full notice and knowledge of all things therein set forth. It is further asserted that the legal title to the property in question is held in trust by respondent for appellant and the prayer is for a decree requiring conveyance to appellant of said title. To this complaint a demurrer was offered. It was sustained, and plaintiff refusing to amend, judgment went
68 accordingly. From said judgment plaintiff appeals.

On March 3, 1905, Congress repealed that portion of the act of June 4, 1897, applicable to the exchange of lands within for public lands outside of forest reservations. This repealing act is in part as follows: "but the validity of contracts entered into by the secretary of the interior prior to the passage of this Act shall not be impaired: Provided, That selections heretofore made in lieu

69 of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof." (33 Stats. 1264.)

It is admitted that plaintiff was not within the exceptions contained in the repealing act because
70 he had no pending selection nor did he have any written contract with the secretary of the interior; but appellant is of the opinion that he obtained a vested right to make a selection of lieu lands as soon as he made and recorded his conveyance of his realty in the forest reservation according to law and that this vested right could not be cut off by the subsequent repealing statute.

The very question here presented has been con-
71 sidered by the secretary of the interior in the case of *Moses L. S. & R. Co.*, 34 L. D. 458. That case was one in its facts very similar to that here considered. The selector had complied with all the requirements of the act of June 4, 1897, but the selection of land in lieu of that which he had sought by deed to relinquish to the United States occurred after the adoption of the repealing act of March 3, 1905. His application was rejected solely because of the repeal by the last mentioned statute of the act of June 4, 1897. In that case, as

72 here, counsel asserted that the partial performance by the selector of the method of procedure prescribed under the "Forest Lieu Act," entitled him to a completion of the transaction by the United States government, and that a refusal by the government to complete the exchange would be "tantamount to the repudiation by the United States of its own solemn agreement." In reply to this contention the secretary of the interior says, in part:

73

"The act of March 3, 1905, repeals not merely the invitation to private owners to relinquish their lands, but all the other provisions looking to an exchange. An exchange is essentially a single contract. The rights in the things exchanged usually vest at the same point of time. (*Lessieur* v. *Price*, 12 How. 59, 74.) While the regulations under the act of June 4, 1897, require the private owner of such lands to record his deed and to prepare and

74 file an abstract and deed at the time he makes his selection, it can not be held that good equitable right to the land relinquished passes to the United States by record of the deed, for some officer of the United States must examine the title, pass upon its sufficiency, and accept it. (*Cosmos Company* v. *Gray Eagle Company*, 190 U. S. 301, 312.) It is a general principle in the law of real estate that title does not pass until the deed is delivered to the grantee. Though acceptance of a title con-

75 veyed is, under some circumstances, presumed from its being beneficial to the grantee, it will be seen from examination of such cases that there was a lapse of time with an entry into possession by the grantee, or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. No case is cited, and none has been found by the department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If
76 the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received the conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into.

"The act of June 4, 1897, was a mere proposal
77 for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the land department. Until it is so filed the United States can know nothing of it, and no officer authorized to act on part of the United States can determine whether such proposed exchange can be approved or not. There is not only no contract, but no existent facts from which a contract of exchange can arise. It all rests solely in the one mind of the private owner as something he merely contemplates doing, and there

78 can be for that reason no concourse of two minds, which is essential to the relation of contract. Under the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated, and is merely a purpose in the private owner's intent.

"A proposal may be withdrawn at any time be-
79 fore acceptance. That the act of March 3, 1905, was a withdrawal of the proposal of exchange hardly admits of question. Were it not so intended, the proviso was wholly unnecessary. If it was intended that selections might be made to satisfy all relinquishments of land made with intent in future to make selections, then it was unnecessary to permit the perfecting of incomplete selections actually made, or to permit reselections upon bases assigned in previous ones that failed
80 without the selector's fault. The proviso necessarily implies that Congress intended to withdraw its general proposal of exchange, and to limit future selections to the specified excepted cases. Congress has plenary power over the subject of disposals of public lands, and the land department is without authority to dispose of public lands unless granted it by Congress."

We think that the views here expressed are sound and that they are conclusive of the question pre-

81 sented by the case at bar. If the United States government was not bound to convey the land selected by plaintiff, obviously no trust could arise in his favor which might be enforced against defendant because any obligation upon the part of the latter would have to draw its force from the contract, if there were one, between the government and the selector; and it would be necessary additionally that defendant should have full knowledge of such agreement.

82 There is nothing in the opinion of this court in *Farnum* v. *Clarke*, 148 Cal. 617, in conflict with this conclusion. In that case the question to be determined was whether or not a person desiring to dispose of his land under the "Forest Lieu Act" could compel his agent to whom he had entrusted the duty of selection and exchange specifically to perform the contract. The significant language of the opinion in that case is as follows:

83 "When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement, and these facts are true, the commissioner of the general land office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection. (*Kern Oil*

84 *Company* v. *Clarke*, 30 L. Dec. Dep. Int. 550.) When such an approval is had by the commissioner, the locator becomes the full equitable owner in the land selected, but it by no means follows that until then he had acquired no interest or right in the land by virtue of his selection. On the contrary, we are satisfied that he did. He was possessed of the right under the act to acquire public land, had exercised that right to become the owner of the particular land on which he
85 filed the selection, and had done all that was required by him to do under the act in order to obtain a perfect title. Under these circumstances, if he acquired nothing more, he acquired at least an inchoate equitable right, a right which was capable of being enlarged into a complete title by the approval of the commissioner of the general land office, and was a right which the land department itself, in effect, recognizes may be sold and
86 assigned after such selection is filed. (*Matter of Mallory*, 31 L. Dec. Dep. Int. 213.)"

The language in that opinion has no application to such a problem as the one here presented, where Congress withdrew the land from exchange before an application had been made to set it apart.

There is no theory by which the duty of the commissioner of the general land office to approve plaintiff's selection, if any existed, could be trans-

87 ferred to defendant; and unless defendant can be charged with responsibility for the omission of the commissioner to perform such duty, if there was one, there can be no trust which defendant is bound to execute. The demurrer was properly sustained and the judgment is therefore affirmed.

MELVIN, J.

We concur:

HENSHAW, J.

LORIGAN, J.

88 SHAW, J.

ANGELLOTTI, J.

SLOSS, J.

Entered and Recorded in Judgment Book 22 at page 26 this 11th day of August, 1909.

FRANK L. CAUGHEY, Clerk.

By ISADOR ERB, Deputy Clerk.

89

90 *In the Supreme Court, State of California.*

T. L. ROUGHTON,
Plaintiff and Appellant,
vs.
HARRY L. KNIGHT,
Defendant and Respondent.

AMENDED COMPLAINT.

91 *In the Superior Court of the State of California, in and for the County of Kern.*

T. L. ROUGHTON,
vs.
Plaintiff,
HARRY L. KNIGHT,
Defendant.

Now comes the plaintiff and by leave of the Court
92 first had and obtained, files this his amended complaint, and alleges:

I.

That the southeast quarter of section twelve (12) in township twenty-nine (29) south, range twenty-five east, Mount Diablo Base and Meridian, is now and was at all the times herein mentioned situated in the County of Kern, State of California, and within the Visalia, California, Land District and on March 14th, 1905, was vacant, surveyed, non-mineral pub-

93 lic land of the United States of America, subject to homestead entry under the homestead law of the United States of America, and contained one hundred and sixty acres of land.

II.

That the northeast quarter of section thirty-five (35) in township nine (9) south, of range twenty-four (24) east, Mount Diablo Base and Meridian, contains one hundred and sixty acres of land now
94 is and at all times since January 1st, 1897, has been situated within the County of Fresno, State of California, and within the exterior bounds of a public forest reservation created by the President of the United States of America under section 24 of an Act of Congress, dated March 3rd, 1891, to-wit: The Sierra Forest Reserve.

III.

95 That on June 8th, 1899, the plaintiff was the owner of the land described in paragraph two hereof and on that day while he was the owner thereof relinquished and conveyed the same unto the United States of America under the provisions of an Act of Congress, dated June 4th, 1897, which relinquishment and deed was duly acknowledged by the said plaintiff on June 8th, 1899, before Dixon L. Phillips, a Notary Public in and for Kings County, California, then and there duly commissioned, qualified and acting as a Notary Public in and for said

96 Kings County, State aforesaid, and qualified to take acknowledgments and certify the same, a copy of which relinquishment and deed is hereto annexed, marked Exhibit "A," made a part hereof and hereby specially referred to.

That said deed was thereafter, to-wit, on June 10th, 1899, recorded in the office of the Recorder of Fresno County, State of California, in book 226 of Deeds, page 315 et seq. That at the time of the
97 execution and recordation of the said relinquishment and deed the land therein described and the whole thereof was owned by plaintiff and the same and the whole thereof was free from liens or incumbrances of every kind or nature.

IV.

That on the 19th day of June, 1899, plaintiff presented and caused to be filed in the United States
98 Land Office at Visalia, California, with the said relinquishment and deed of which Exhibit "A" is a copy, a complete abstract of title of the said land in said relinquishment and deed described, which abstract of title was duly authenticated by the Recorder, Auditor and Clerk of the said County of Fresno, State of California, and said abstract of title showed a perfect title free of all liens or incumbrances to all of the said northeast quarter of section thirty-five (35) in township nine (9) south, range twenty-four (24) east, Mount Diablo Base

and Meridian, (and being the land in Exhibit "A" described) to be vested in the United States of America, through, under and by virtue of the execution and recordation of said relinquishment and deed hereto annexed and marked Exhibit "A" and not otherwise and which deed and relinquishment and said duly authenticated abstract of title was by the Register and Receiver duly forwarded June 19th, 1899, and received about June 25th, 1899 by the Commissioner of the General Land Office at Washington, D. C., and was so held in the office of the Commissioner of the General Land Office until the 3rd day of January, 1905, when the said relinquishment and deed and the said abstract of title were duly returned by the said Commissioner of the General Land Office to the Register and Receiver of the United States Land Office at Visalia, California, for delivery to the plaintiff and on the 9th day of January, 1905, they were by said Register and Receiver delivered to the plaintiff. That neither the said Commissioner of the General Land Office nor any other official of the United States of America ever made any objection either to the form or to the sufficiency of the said relinquishment and deed or the said abstract of title and plaintiff alleges that both the said relinquishment and deed and the said abstract of title complied in all respects with the requirements of law, and the regulations of the Interior Department of the United States of America.

102 V.

That this plaintiff thereafter, to-wit, on March 14th, 1905, presented his application in writing to the Register and Receiver of the United States Land Office at Visalia, California, to select the said southeast quarter of section twelve (12), in township twenty-nine (29) south, range twenty-five (25) east, Mount Diablo Base & Meridian, containing one hundred and sixty acres of land in lieu of the said
103 northeast quarter of section thirty-five (35) in township nine (9) south, range twenty-four (24) east, Mount Diablo Base & Meridian, which last named tract had been conveyed unto the United States of America under the relinquishment and deed hereto annexed and described as Exhibit "A" and which application was accompanied by a duly authenticated abstract of title of the last described tract of land and by the relinquishment and deed of which
104 Exhibit "A" is a copy, and said application in writing, relinquishment and deed and said abstract of title were duly received and filed in the United States Land Office at Visalia, California, on March 14th, 1905. That said application, relinquishment and deed and said abstract of title were each and all in the form, and accompanied by all the certificates or affidavits required by law and the rules and regulations of the Secretary of the Interior and the Commissioner of the General Land Office and by the filing of the same the plaintiff duly selected the

land described in paragraph one hereof, under and by virtue of the provisions of said Act of Congress, approved June 4th, 1897, as amended by the Act of Congress of June 6th, 1900. That plaintiff had not at the time said selection was made nor has he since selected or received any land in lieu or in exchange for the land so conveyed to the United States of America under Exhibit "A" but was at the time of the making and presentation of said selection entitled to select the said land described in his said application, to-wit: The southeast quarter (S. E.¼) of section twelve (12) in township twenty-nine (29) south, range twenty-five (25) east, Mount Diablo Base & Meridian.

VI.

By and in virtue of the provisions of the said Act of Congress, approved June 4th, 1897, and the matters and things herein before set forth on March 14th, 1905, the plaintiff became entitled to the issuance by the United States of America of a patent conveying to him the legal title to the land described in the first paragraph of this complaint and the plaintiff at that time and continuously ever since duly demanded the issuance of such patent, but the United States of America and the Secretary of the Interior and the Commissioner of the General Land Office have at all times refused to issue the same.

VII.

Notwithstanding the premises and wholly disre-

garding the rights and title of the plaintiff, on or about November 15th, 1907, the United States of America, without lawful authority, issued and delivered its patent conveying the legal title of the land described in the first paragraph hereof to the defendant, Harry L. Knight, and the said defendant Harry L. Knight claims that the said patent conveyed the legal title of said land in fee simple absolute, to him, free from any trust for, or obligation to convey the same to the plaintiff. But in fact, the said patent conveyed the legal title in trust for the plaintiff and ever since November 15th, 1907, has held and now holds the same in trust for the plaintiff and is under a legal obligation to convey the same to plaintiff and the claims of the defendant to the contrary are pretenses and wholly without right.

VIII.

After the said patent was issued and prior to the commencement of this suit, the plaintiff duly demanded of the defendant a conveyance to him of the title conveyed by the said patent, but the defendant at all times refused to convey the same to the plaintiff.

IX.

That said defendant at all times had full notice and knowledge of all matters and things in this complaint set forth.

WHEREFORE, the plaintiff prays the decree of

111 this Court, that he is the rightful owner of the land described in the first paragraph of this complaint, that the defendant holds the legal title to said land, in trust for and requiring him to convey the same to the plaintiff, free of all encumbrances and for such other and further relief as the nature of this case may require, together with costs of suit.

HANNAH & MILLER,
Attorneys for Plaintiff.

112 EXHIBIT "A."

Whereas, the northeast quarter (N.E.¼) of section thirty-five (35) in township nine (9) south of range twenty-four (24) east, M. D. M. Situated in the County of Fresno, State of California, and containing 160 acres, is included within the limits of a Public Forest Reservation, designated and reserved by the President of the United States under an Act approved March 3rd, 1891.

113 And whereas, it is provided by the Act of Congress of June 4th, 1897, as follows: That in cases in which a tract covered by an unperfected bona fide claim or by a Patent is included within the limits of a Public Forest Reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant public land open to settlement, not exceeding in area the tract covered by his claim or patent, and no charges shall be made in such cases for making the entry of rec-

ord or for issuing the Patent to cover the tract selected;

And whereas, I, T. L. Roughton, unmarried, of the County of Kings, State of California, am the owner of the above described tract of land, containing 160 acres and desire to relinquish the same to the Government and select in lieu thereof a tract of vacant public land open to settlement.

Now, Therefore, in consideration thereof, I, T. L. Roughton, of the County of Kings, State of California, do hereby release, remise, grant, relinquish and quit claim unto the United States of America, the following described land, situate in the County of Fresno, State of California, to-wit: The northeast quarter (N.E.¼) of section thirty-five (35) in township nine (9) south, range twenty-four (24) east, M. D. M., containing 160 acres.

In witness whereof, I have hereunto set my hand and seal this 8th day of June, 1899.

T. L. ROUGHTON (Seal.)

State of California, }
County of Kings. } ss.

On this 8th day of June, A. D. 1899, before me, Dixon L. Phillips, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared T. L. Roughton, known to me to be the person described in, whose name is subscribed to, and who executed

the within and annexed instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal the day and year in this certificate first above written.

(Seal.) DIXON L. PHILLIPS,

Notary Public in and for said County of Kings, State of California.

(Endorsed):

Filed for record at the request of C. W. Musick, June 10, A. D. 1899, at 2 min. past 11 o'clock a. m., and recorded in Vol. 226 of Deeds, page 315 et seq., Fresno County Records.

J. M. KERR, Recorder.

By J. E. Hughes, Deputy Recorder.

(Endorsed):

"Amended Complaint.

Filed Dec. 12, 1907.

I. L. MILLER, Clerk."

DEMURRER TO AMENDED COMPLAINT.

Comes now the defendant herein and demurring unto plaintiff's amended complaint for grounds of demurrer alleges:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

II.

That there is a defect of parties defendant in this

120 that it appears from the amended complaint the United States of America, the Secretary of the Interior, and the Commissioner of the General Land Office should have been made parties defendant.

III.

That said amended complaint is ambiguous in this respect, that it cannot be ascertained therefrom in what manner, or how defendant has held or now holds the legal title to the premises described in 121 said amended complaint in trust for the plaintiff, or is under a legal obligation to convey the same to plaintiff, or in what manner or how the claim of defendant is without right.

IV.

That said amended complaint is unintelligible for the reasons mentioned in paragraph III hereof.

V.

122 That said amended complaint is uncertain for the reasons mentioned in paragraph III hereof.

Whereof, defendant prays that he may be hence dismissed and have his costs of suit.

GEO. E. WHITAKER,
Attorney for Defendant.

(Endorsed):
Demurrer.
Filed March 6th, 1908.

I. L. MILLER, Clerk.
By Ham Farris, Deputy Clerk.

123 Received copy of the within Demurrer this 6th day of March, 1908.

HANNAH & MILLER, and
ROWEN IRWIN,
Attorneys for Plaintiff.

MINUTE ORDER SUSTAINING DEMURRER.

In the Superior Court of the County of Kern, State of California.

124 Tuesday, March 17, 1908. Court met at ten o'clock a. m. Present, Hon. Paul W. Bennett, Judge.

T. L. ROUGHTON,
Plaintiff,

vs.

HARRY L. KNIGHT,
Defendant.

125 In this case, defendant's demurrer to plaintiff's amended complaint having heretofore been submitted to the Court and by the Court taken under advisement, and the Court duly considered the same, and being fully advised in the premises, orders that defendant's demurrer to plaintiff's amended complaint be sustained.

JUDGMENT.

The demurrer heretofore interposed by the defendant herein to the amended complaint of the plaintiff on file herein having come on regularly for

hearing before the above entitled Court, Department No. 2 thereof, on the 9th day of March, 1908, Messrs. Hannah & Miller and Rowen Irwin, Esq., appearing as counsel for the plaintiff, and Geo. E. Whitaker, Esq., appearing as counsel for the defendant at said hearing, and the matter having been argued and submitted to the Court for its decision, and the Court after having duly considered the same made and entered its order on the 17th day of March, 1908, sustaining the demurrer interposed by said defendant to said amended complaint.

And the said plaintiff having on the 18th day of March, 1908, filed in said court his notice declining to amend said amended complaint, and waiving all time in the premises.

Now therefore, it is ordered, adjudged and decreed that plaintiff take nothing against the defendant and that said defendant recover from plaintiff his costs of suit, amounting to ..... dollars.

PAUL W. BENNETT,
Judge of said Superior Court.

Dated March 24th, 1908.

(Endorsed):

"Entered and recorded in Judgment Book II at page 46. I. L. MILLER, Clerk."

129 (Title of Court and Cause).

NOTICE OF APPEAL.

The defendant and his attorney will please take notice that the plaintiff hereby appeals to the Supreme Court of the State of California, from the judgment given and made in the above entitled action on the 24th day of March, 1908, and entered and recorded in Judgment Book II of said Court
130 at page 46, and from the whole thereof.

Dated March 26th, 1908.

To Geo. E. Whitaker, Esq., Attorney for Plaintiff.

HANNAH & MILLER,
ROWEN IRWIN,
Attorneys for Plaintiff.

(Endorsed):

Service and receipt of a copy of the within No-
131 tice admitted this 30th day of March, 1908.

GEO. E. WHITAKER,
Attorney for Defendant

(Endorsed):

Filed March 30, 1908.

I. L. MILLER, Clerk.
By Ham Farris, Deputy Clerk.

(Title of Court and Cause).

CERTIFICATE OF COUNSEL.

It is hereby stipulated and certified by the attor-

132 neys for the appellant and respondent herein, that the foregoing transcript contains true copies of the papers constituting the judgment roll therein, together with the endorsements thereon, to-wit:

The Amended Complaint,

The Demurrer thereto,

The minute order sustaining the demurrer, and

The Judgment entered by the Court, and also

133 A true copy of the Notice of Appeal herein with the endorsements thereon;

And it is further stipulated and certified that a good and sufficient undertaking on appeal has been filed by the appellant within the time allowed by and as required by law.

Dated this 6th day of April, 1908.

HANNAH & MILLER,
ROWEN IRWIN,
134 Attorneys for Appellant.
GEO. E. WHITAKER,
Attorney for Respondent.

CLERK'S CERTIFICATE.

United States of America—ss.

I, Frank L. Caughey, Clerk of the Supreme Court of the State of California, by virtue of the foregoing Writ of Error, and in obedience thereto, I herewith transmit to the Supreme Court of the

135 United States a duly Certified Transcript of the complete record and proceedings in the above entitled case, with all things concerning the same and do hereby certify that the foregoing pages one to 46 inclusive, contain a full and true transcript of the original records, documents and proceedings had in the Supreme Court of the State of California in the cause of T. L. Roughton plaintiff in Error, against Harry L. Knight, defendant in error, as remains of record and on file
136 in the Clerk's office, including Transcript of Record in the Supreme Court of the State of California, Judgment, Petition for Writ of Error, Order Allowing Writ, Specifications and Assignment of Errors, Prayer for Writ, Bond, Writ of Error, and Citation.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City and County of San Francisco, State of Cali-
137 fornia, this 21st day of September, in the year of our Lord one thousand nine hundred

J. L. Vaughey, Clerk.

By Isador Erb, Deputy Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 711.

T. L. ROUGHTON, *Plaintiff and Appellant in Error,*

vs.

HARRY L. KNIGHT, *Defendant and Appellee in Error.*

BRIEF OF PLAINTIFF AND APPELLANT.

STATEMENT.

In substance the amended complaint sets forth that on June 8, 1899, the plaintiff, being the owner of the north-east quarter of section thirty-five, in township nine south, range twenty-four east, Mount Diablo base and meridian, in Fresno County, California, situate within the Sierra Forest Reserve, a duly created forest reservation of the

United States, desiring to avail himself of the privilege of lieu selection offered by the act of Congress of June 4, 1897, known as the Forest Reserve Exchange act, relinquished and conveyed the same to the United States, pursuant to said act, by deed duly executed, acknowledged and recorded. The deed, which is attached to said amended complaint as an exhibit, recites the exchange provisions of said act of Congress, and states that Roughton makes the same in pursuance of his desire to make a lieu selection of vacant land open to settlement under said act. It further appears that on June 19, 1899, the plaintiff presented and caused to be filed in the United States Land Office at Visalia, said deed and relinquishment and an abstract of title, authenticated as required by the regulations of the Land Department, showing a perfect title vested in plaintiff to the relinquished land; that the register and receiver of the local office promptly forwarded such deed, relinquishment and abstract to the Commissioner of the General Land Office at Washington, D. C., who received the same about June 25, 1899; and that said documents and papers were held in the office of the Commissioner until the 3d day of January, 1905, when the Commissioner sent them back to the local officers for delivery to the plaintiff, and that on January 9, 1905, they were by such local officers delivered to plaintiff; that neither the Commissioner nor any other official of the United States ever objected to the regularity or form of the deed, relinquishment or abstract of title.

It is further alleged that on March 14, 1905, plaintiff filed with the register and receiver of the land office at Visalia, California, an application to select the southeast quarter of section twelve, in township twenty-nine south, range twenty-five east, Mt. Diablo base and meridian, in lieu of the said land so alleged to have been relinquished and conveyed to the United States, the application being

accompanied by the aforesaid relinquishment and deed, and by a duly authenticated abstract of title, as required by the Departmental regulations, and which application was made by plaintiff under the provisions of said act of June 4, 1897.

Plaintiff further alleges that by reason of his conveyance and relinquishment he did all the things required of him to do to entitle him to a patent to the selected land, and that ever since the date of said selection he had continually demanded the issuance of patent, but that the United States, the Secretary of the Interior and the Commissioner of the General Land Office at all times refused to issue the same; that notwithstanding the premises, on or about November 15, 1907, the United States, without lawful authority, issued a patent conveying the legal title to the selected land to Harry L. Knight, who received the same after having at all times had full knowledge and notice of the plaintiff's rights.

Plaintiff accordingly prayed for a decree that he be declared the owner of the land, that the defendant holds the legal title in trust for plaintiff and that he be required to convey to plaintiff.

The defendant's demurrer to the complaint was sustained, and the plaintiff declining to further amend, the court entered judgment for defendant, from which judgment the plaintiff appealed to the Supreme Court of California. From the latter court's judgment of affirmance, the writ of error was sued out to this court.

This case has throughout dealt with the construction of the act of Congress of June 4, 1897, plaintiff claiming that by the relinquishment and conveyance to the United States of his title to land within the forest reserve, his rights vested, so that by the repealing act of March 3, 1905, Congress could not deprive him of the same, and the officials

of the Land Department having erroneously caused a patent to issue to Knight, the latter should be charged as plaintiff's trustee.

ARGUMENT.

I.

TITLE PASSED TO THE UNITED STATES UPON THE RECORDING OF THE DEED OF RELINQUISHMENT.

In holding against us on the point stated in this heading, the State Supreme Court, on the authority of W. E. Moses Land, Scrip and Realty Co., 34 L. D., 458, that title did not pass to the United States by the recording of the deed and delivery of the same to the local land officers, and it quoted with approval a large portion of said land decision, in part as follows:

> "The act of March 3, 1905, repeals not merely the invitation to private owners to relinquish their lands, but all the other provisions looking to an exchange. An exchange is essentially a single contract. The rights in the things exchanged usually vest at the same point of time (Lessieur vs. Price, 12 How., 59, 74). While the regulations under the act of June 4, 1897, require the private owner of such lands to record his deed and to prepare and file an abstract and deed at the time he makes his selection, it cannot be held that good equitable right to the land relinquished passes to the United States by record of the deed, for some officer of the United States must examine the title, pass upon its sufficiency and accept it. (Cosmos Company vs. Gray Eagle Company, 190 U. S., 301, 312.) It is a general principle in the law of real estate that title does not pass until the deed is delivered to the grantee. Though acceptance of a title conveyed is, under some circumstances, presumed from its being beneficial to the grantee, it will be seen from examination of such

cases that there was a lapse of time with an entry into possession by the grantee, or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. No case is cited, and none has been found by the Department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received a conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into."

We shall later answer other quoted portions of the Secretary's opinion.

The act of June 4, 1897, contains the following exchange provisions:

> "That in cases in which a tract covered by a patent is included within the limits of a public forest reservation * * * the owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his patent. * * * "

The decision of the Commissioner does not reach the gist of the question. While it is true that the mere recording of a deed does not operate as a delivery and pass title, it is also true that where the vendee **assents in advance to the transaction** the recording does operate as a delivery and pass title.

Devlin on Deeds states the rule as follows:

> "Sec. *262*. **Delivery a question of intention.** As no particular form of delivery is required, the question whether there was a delivery of a deed or not so as to

pass title, must in a great measure depend upon the circumstances. The question of delivery is one of intention, and the rule is that a delivery is complete when there is an intention manifested on the part of the grantor to make the instrument his deed. 'The doctrine seems to be settled beyond a reasonable doubt,' remarks Judge Atwater, 'that where a party executes and acknowledges a deed, and afterwards, either by acts or words, expresses his will that the same is for the use of the grantee, **especially where the assent of the grantee appears to the transaction,** it shall be sufficient to convey the estate, although the deed remains in the hands of the grantor * * * ' The main thing which the law looks at is whether or not the instrument shall pass into the possession of the grantee, and if that will is manifest, then the conveyance inures as a valid grant, although, as above stated, the deed never comes into the hands of the grantee."

"Sec. 269. **Manual delivery not requisite.** Actual manual delivery and change of possession are not requisite in order to constitute an effectual delivery. But whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. * * * 'The law does not prescribe any particular form of words or actions as necessary to constitute a delivery. Anything done by the grantor from which it is apparent that a delivery is thereby intended, either by words or by acts or by both combined, will be sufficient.'

"Sec. 291. While, as we have seen in the preceding section, mere registration does not operate as a delivery, yet if the deed is delivered to the register for the use of the grantee, and he is made the latter's agent, either expressly or impliedly, the registration is an effectual delivery. In a case in the Supreme Court of the United States, where it was held that the placing of a deed on record, the grantee being ignorant of its

> execution, **and not having authorized or given his assent to the recording,** did not operate as a delivery so as to give the grantee precedence over a mortgage executed between registration and a formal subsequent delivery. Mr. Justice Davis said: 'The placing of the deed on record was Bovey's own act and done without the *assent* of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed and delivery of it to the register for that purpose does not vest title in the grantee.' But the learned judge added as a qualification to this general rule that **'if Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been, in contemplation of law, a delivery to him.'** * * * In other words, it may be said that the delivery is valid when it appears that the deed was placed on record with the intent that it should pass title to the grantee, although never actually delivered to the grantee."
>
> See 13 Cyc. 567-8; 9 Am. & Eng. Ency. of Law (2d Ed.), 159.

In Sections 287, 288, 289 and 290, Devlin discusses the question as to whether or not acceptance is presumed from recording. He cites Mr. Chief Justice Thurman of Ohio, to the effect that the law will indulge such presumption. Among other things Judge Thurman said:

> "It is certainly true as a general rule that acceptance by the grantee is necessary to constitute a good delivery, for a man may refuse even a gift. But, that such acceptance need not be manual is equally true, **and it is also certain that simple assent to the conveyance, given even before its execution, is a sufficient acceptance."**

When Congress enacted, in said Forest Reserve Exchange Act, that when the owner of lands within a forest

reserve desired to do so, he might relinquish the same to the United States, and might select other lands in lieu thereof, it plainly intended an acceptance of every title so relinquished.

The Land Department, in its regulations, recognized the said intention. The regulations announced June 30, 1897, provide:

> "Rule 16. Where final certificate or patent is issued it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, and have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States."

The circular of May 9, 1899, provided:

> "In all cases relinquishments made in pursuance of said act must be executed, acknowledged and recorded in the same manner as conveyances of real estate are required to be executed, acknowledged and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States, there must also be filed with the relinquishment a duly certified abstract of title, showing that at the time the relinquishment was filed for record, the legal title was in the party making the relinquishment, and that the land was free from liability for taxes and other incumbrances."

This regulation was mandatory. It required the full investiture of title in the United States before a selection could be made. The regulation was undoubtedly within the competency of the Land Department. As completely as a private owner could assent, the United States thus assented in advance

to the delivery to it of title in every case, and when the relinquisher recorded his conveyance he did so because he had no alternative. Where a conveyance is recorded at the express requirement of the grantee, it is idle to speak of lack of delivery.

In the State Supreme Court the defendant in error claimed that even if title passed to the United States by the recording of the deed and delivering the deed, relinquishment and abstract to the Land Department, yet when, in January, 1905, the Commissioner returned the same to the relinquisher, there was a redelivery, and consequently when the selection was made it was a new transaction, and the act of June 4, 1897, having been repealed, the selection was void. As to this claim, suffice it to say that "a delivery, without fraud or mistake, of a duly executed deed, passes a title which can be divested only by a condition in the deed itself" (9 Am. & Eng. Ency., 2d Ed.), and that a redelivery is not effectual to pass back the title.

The Secretary cites the decision of the Supreme Court in Cosmos Exploration Co. vs. Gray Eagle Co., 190 U. S., 301, in support of its contention. But that case warrants no such interpretation. It merely held that pending the final determination by the Department on the merits of a lieu selection, the selector could not come into a court of equity claiming the complete equitable title, and secure a final injunction against mineral claimants trespassing thereon, and that the Land Department had exclusive jurisdiction of the questions of law and fact then before it; that the selector's assertion that he had conveyed title to the United States might or might not be true, but he could not decide for himself; that such question had to be determined by officers of the Land Department; that their determinations, as to questions of fact were conclusive, but as to questions of law could be challenged and overturned by the courts when the Land Department's jurisdiction had ceased.

II.

When the Owner of Lands Within a Forest Reserve Relinquished the Same to the United States, Pursuant to the Provisions of the Act of June 4, 1897, He Thereby Accepted the Offer Contained in the Act, and a Contract Was Created.

As against this proposition, the State Supreme Court quotes the Moses case, 34 L. D., 458, *supra*, as follows:

> "The act of June 4, 1897, was a mere proposal for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the Land Department. Until it is so filed the United States can know nothing of it, and no officer authorized to act on the part of the United States can determine whether such proposed exchange can be approved or not. There is not only no contract, but no existent facts from which a contract of exchange can arise. It all rests solely in the one mind of the private owner as something he merely contemplates doing, and there can be for that reason no concourse of the two minds, which is essential to the relation of contract. Under the act of June 4, 1897, it is the filing of the deed in the local office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the change is not initiated, and is merely a purpose in the private owner's intent."

Accordingly the court, following the secretary, held that the relinquishment and selection had to be contemporaneous, and that the mere relinquishment not initiating the exchange, the act of March 3, 1905, which repealed the act of June 4, 1897, saving only pending selections, was a withdrawal of the proposal of exchange antedating the acceptance by selection.

It does not follow that because in some contracts of ex-

change mutual conveyances and mutual vesting of title are required to be concurrent acts before any title vests, that all contracts of exchange are of that description. Parties are undoubtedly at liberty to stipulate that title shall not pass until there is a mutual performance, but such is not the legislative contract here under consideration. Here the law requires a relinquishment of title before there can be any lieu selection. Instead of requiring that a party proposing an exchange should file an application therefor, and, upon approval of his selection, convey to the United States, both the law and the regulations thereunder demand that title shall be revested in the United States before any right to select accrues.

It is somewhat singular that the lower court and the department have overlooked the grammatical construction of the act. It provides that the owner of lands within a forest reserve "*may*, if he desires to do so, relinquish the tract to the government, and *may* select in lieu thereof a tract of vacant land open to settlement." Plainly two options were given, first, for the owner to relinquish if he so desired, and second, **for him to select if he so desired.** The repetition of the word "*may*" was entirely unnecessary unless we ascribe this intention to Congress. While if it had been omitted, we believe that a right of lieu selection would have vested upon relinquishment, yet we urge that the repetition of the words was intentional, intended to enable the relinquisher to select or not, as he pleased, and when he pleased. It was the plain intention of the lawmakers to grant the relinquisher the broadest right of selection possible. As said in Farnum vs. Clarke, *infra*, the relinquisher's "right under the act to make such selection was coextensive with the public domain, and limited only to the selection of lands which were vacant and open to settlement." Why was this broad right of selection granted? Because Congress desired, in order to protect and police

the forest reserves, to acquire as speedily as possible, title to all lands therein. It therefore did not restrict the right of selection to the State in which the lands lay, but applied it to the entire public domain. In keeping with this policy it gave the relinquisher a right to select or not, so that he could not be compelled to make a lieu selection at the time of his relinquishment. To have compelled him to do so would have retarded relinquishments and thus have tended to defeat the very purpose of the act. If that had been the law, the owner of the land within the reserve would have been compelled to retain it until he had found some land which he might select, and this to him, would have proved an expensive and tedious process, possibly consuming many years.

In F. A. Hyde *et al.*, 28 L. D., 284, Secretary of the Interior Hitchcock stated that the objects for which the forest reserves were created, were the securing of a permanent supply of timber for the people and the insuring of conditions favorable to continuous water flow. He said:

> "It is obvious that the accomplishment of these objects would be subserved and promoted by exclusive government ownership and control of the lands within the reservation boundaries. The extinguishment of the claims, ownership and control of other parties in and over the lands, of the class or classes intended to be reserved, is very desirable on the part of the government, and where this can be done agreeably to the wishes of such parties under a reasonable construction of the above provision for an exchange of lands, it is believed to be the duty of the Land Department to place such construction upon the law and thus promote the best interests of all concerned."

The secretary said further, of the exchange provision in the act of June 4, 1897:

> "The provision is remedial in character, and should therefore be so construed as to advance the remedy and compass the objects sought."

But in the Moses case the provision was so construed as to retard the remedy, and narrow the objects sought. We are unable to see how any possible construction of the provision, by which the Land Department throws back a conveyed title upon a relinquisher, can be harmonized with the government's desire to get the land. It was to its interest to get all of the lands in private ownership within forest reserves that it could, and to allow the relinquisher to make lieu selections or not, as he saw fit. The department ruled squarely against the intent of Congress.

A ruling that no contract was created by the relinquishment also violates the settled laws of real property. A contract of exchange is construed exactly as are contracts of sale, and there can be no question that when one accepts an offer by doing the very thing that the offerer makes a prior condition, that the minds of the parties meet and a contract is created.

The main argument we have to meet is that the minds of the parties do not meet until there is a lieu selection and approval. It is true that the minds do not meet as to what land shall be selected. But that is not necessary to the formation of such a contract.

If, as between private parties, one party makes an offer to sell to any one who would buy and pay him the price (the payment being a prior condition to the purchase), any number of acres, to be selected out of the vendor's land by the vendee, the payment of the purchase price by the vendee and its acceptance would give the latter a vested right to make the selection and receive the land. Thus it is held that a promise to convey a certain number of acres out of a large tract, the location and method of the ascertainment being

pointed out, will be specifically enforced, as that which might otherwise be uncertain, is made certain by the act of selecting.

Lingeman vs. Shirk, 42 N. E. (Ind.), 34-5.
Carpenter vs. Lockhard, 1 Ind., 434.
Baldwin vs. Kerlin, 46 Ind., 426.
Cheney vs. Cook, 7 Wis., 413.
Washburne vs. Fletcher, 42 Wis., 152.
Roehl vs. Hammexer, 114 Ind., 311, 315.
Colerick vs. Hooper, 3 Ind., 316.
Williamson's Heirs vs. Johnstone and Nash's Heirs, 20 Ky.,253.
Owing's Executors vs. Morgan, 7 Leigh (Va.), 548; 33 Am. Dec., 257.
Ernshwiller vs. Tyner, 54 Ohio St., 214.

In such matters the courts follow the maxim, *"id certum est, quod certum reddi potest."*

Suppose A agrees to convey to B twenty acres of his land, to be selected by B, if B will first convey to him, A, twenty acres of his own land, and B conveys the twenty acres, there is most certainly a contract in existence, though the act of selecting is not contemporaneous with the conveyance of B's land. When B conveys he acquires the right to select twenty acres out of A's land and can enforce a conveyance. He may make the selection at the time he conveys or five years later. His right is as much his property as lands, money or stock certificates. As to when the right of selection must be exercised, the act under review is silent. In its construction of the rights of indemnity selection granted railroad companies, whenever the railroad company has shown a loss the Land Department has permitted a lieu selection, no matter how long a time after the loss. In Gulf Island R. R. Co. vs. United States, 22 L. D., 560, the company relinquished lands in 1884, and made a lieu selection, years after, which was approved, and doubt-

less the same thing has been done in scores of cases. Laches in making the selection cannot be imputed to the relinquisher until he is confronted with some duty to select, and the act in question imposed no such duty upon him.

It has been contended that there can be no meeting of the minds of the relinquisher and the government, until the officers of the Land Department have examined into and approved the relinquishment and selection. As we have already shown the Supreme Court in Gray Eagle Co. vs. Cosmos Exploration Co. did not so hold. The department has fallen into error from assuming that in some way it is for it to accept the title. To the contrary, the law accepts every good title, the department being without power to reject it. If it does so, the courts will everywhere afford relief, as soon as the selected lands pass into private hands. When title passes is a matter of law; what the officials think about it is another thing.

It must be remembered that the two parties to the contract are the relinquisher and the United States, not the relinquisher and the land officials. Their rejection of a selection does not conclude the question that title did not pass, because, after their jurisdiction ceases, the courts will announce as a matter of law whether title will pass. As said in Kern Oil Co. vs. Clarke, 30 L. D. at page 561:

> "This examination is had for the purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary prerequisites, has entitled himself to a patent, and not for the purpose of determining whether or not those officers will consent to the selection."

When a soldier's widow applies for a pension, the Commissioner of Pensions must pass upon proof of the soldier's death before he can approve the application. But the ap-

proval by the commissioner does not kill the soldier; nor would the rejection of the application restore him to life. The fact of death is distinct from the finding of death. Equally so, the passing of a good title to the government is distinct from the finding that a good title passed. If title in fact passed, the result of any investigation by the department would be merely declaratory of that which existed, as an independent fact, prior to and independent of such investigation.

Nor can there be any objection to considering a contract as created by the acceptance of the government's offer, because the offer is a general one, extended to all persons. Presumably it is for this reason that the secretary termed it a "proposal to exchange." The act of June 4, 1897, is more than a mere proposal.

> "If one makes an offer to another, or to all persons in general, and does not withdraw from it while the other person, in the former case, or any one, in the latter, goes forward and does the thing, such performance carries with it an acceptance of the offer, and the person who made it must do as he proposed."
>
> Bishop on Contracts (2d Enlarged Edition), Sec. 330.

> "In case the party to whom the offer is made has done all that is prescribed in the offer as requisite for an acceptance, the offer is accepted, whether the party offering has actual knowledge of the acceptance or not."
>
> Page on Contracts, Sec. 48.

In Pennoyer vs. McConnaughey, 43 Fed., 196, Deady, J., construing the Oregon act for the sale of swamp lands, said:

"The transaction as set forth in the statute has all the elements of a contract of sale. The statute is a formal, standing offer by the State of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board and complying with the subsequent conditions of payment and reclamation.

"The application is a written acceptance of the offer of the State in relation to the land described therein, and on the filing of the same, the minds of the seller and the purchaser—the State and the applicant—come together on the proposition and thenceforth there was an agreement between them for the sale and purchase of the land, binding on each of them, until released therefrom by some substantial default of the other, not overlooked or excused."

And of the Forest Reserve Exchange Act, Judge Ross, in Olive Land & Development Co. vs. Olmstead, 103 Fed., 573, said:

"The statute in question is a plain standing offer on the part of the government to exchange any of its land that is vacant and open to settlement for a like quantity of similar land within a forest reservation for which it had already issued a patent, * * * the owner of the tract within the reservation being required to relinquish his tract to the government, in consideration of which he is given the right to select in lieu thereof a tract of vacant land open to settlement. * * *"

And the Supreme Court of California had the same act under consideration in Farnum vs. Clarke, 84 Pac., 168, wherein it said:

"The effect of the terms of the act was to provide for an exchange of lands between the United States and the owner or claimant of lands within forest reser-

> vations. On one hand the individual conveyed his land within the reservation to the United States, **and on the other hand the United States granted him the right to select in lieu thereof, a quantity equal to what he had conveyed to it, the same to be selected from the public domain. His right under the act to make such selection was coextensive with the public domain, and limited only to the selection of lands which were vacant and open to settlement."**

It is true that, as the lower court herein said in this case, in Farnum vs. Clarke a lieu selection had been made. But the court was then necessarily construing the language of the law, and if its construction be *dicta*, it is *dicta* of the strongest kind, and in exact accord with the intention of Congress and the rulings of the courts.

III.

Inasmuch as the Relinquisher's Right to Make a Lieu Selection Vested Prior to the Repeal in 1905 of the Act of June 4, 1897, Congress Was Without Power to Divest the Right, and the Action of the Land Department in Cancelling the Selection and Patenting the Selected Land to Another Was a Taking of Property Without Due Process of Law.

The act of March 3, 1905, repealed the act of June 4, 1897, but provided:

> "That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patent issued therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same, any pending selection be held invalid, another selection for a like quantity may be made in lieu thereof."

In protecting pending selections the law is merely declaratory, and in giving a selector whose selection has failed the right to make another selection on the same relinquishment and basis, he acquires nothing which he had not before. There is no mention made of cases where relinquishments had been made, but no selections filed. It is safe to say that it was not within the intention of Congress to attempt to interfere with vested rights. Such rights were left as the repealing act found them, and it is thoroughly settled that such a retrospective intent is not to be imputed to Congress. But suppose that Congress had intended to do more than prevent future relinquishments and selections, and to annul relinquishments previously made and accrued rights of lieu selection, what effect would the repealing act then have?

In Fletcher vs. Peck, 6 Cranch., 87, Chief Justice Marshall said:

> "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and the act of annulling them, if legitimate, is rendered so by a power applicable to every individual in the community.
>
> "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where may they be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? The validity of the rescinding act, then, might be well doubted were Georgia a sovereign power. * * *"

See Story on Constitutional Law, Sec. 1391.
McGee vs. Mathis, 4 Wall, 143.
Citizens Association vs. Topeka, 20 Wall., 663.
Davis vs. Gray, 16 Wall., 232.
State vs. Wilson, 7 Cranch., 166.
Telfener vs. Russ, 145 U. S., 522.
Montgomery vs. Kasson, 16 Cal., 189.

In Gulf Island R. R. Co. vs. United States, 22 L. D., 560, an act of Congress that if the railroad company filed a relinquishment of lands which were settled upon after the railroad's grant had attached, it should be entitled to make lieu selections in lieu of those relinquished. Secretary Hoke Smith held that by virtue of a relinquishment made in 1884, the company acquired a vested right of lieu selection, saying:

> **"For such lands as had been relinquished under the act of 1874, the company had acquired a vested right of selection, and subsequent legislation could not operate upon such right. Were it plain that Congress intended by the act of 1890 to forfeit such right, a question of constitutional limitation upon the power of that body would arise over which this department would have no jurisdiction, but it is a familiar rule of statutory construction that the legislative power will not be presumed to have intended that which it did not have authority to do.**
>
> "The company's relinquishment under the act of 1874 was intended to embrace, and perhaps did embrace, all the earned lands of the road claimed by pre-emption and homestead settlers under the public land laws of June 24, 1884, the date thereof. It could not be presumed, therefore, that the company relinquished these same lands under the act of 1890. **It did not have them to relinquish. The United States had been reinvested with title."**
>
> See also 23 L. D., 565; 12 L. D., 547, and 9 L. D., 237.

In construing said act of 1874 it did not enter the minds of the then Secretaries of the Interior that title to the relinquished lands could not vest in the United States until a lieu selection was made and approved.

The prohibitions contained in Amendment V of the Constitution against taking property without due process of law or compensation, apply to vested, contractual rights.

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional provision which prevents States from passing laws impairing the obligations of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given these corporations to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligation in respect to subsidy bonds, otherwise than according to the terms of the contract already made in that action. **The United States are as much bound by their contracts as individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality or a citizen. No charge can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporations. All this is indisputable.**"
>
> Sinking Fund Cases, 99 U. S., 700, 718, 719, 720.

And see:

> United States vs. Union Pac. Ry., 160 U. S., 34.
> Houston & Texas Cent. R. Co. vs. Texas, 170 U. S., 261.

It is furthermore settled that the prohibition contained in the 5th Amendment is not confined to judicial proceedings, but is a restraint on every department of the government. It applies as well to the Land Department as to Congress.

> "The power of supervision and correction is not an unlimited or arbitrary one. It can be exercised only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is so presented that the judiciary can act upon it."
>
> Cornelius vs. Kessel, 128 U. S., 456.

Where a Secretary of the Interior attempted to revoke an order of his predecessor in office, approving a railroad company's application for a right of way, the Supreme Court held that:

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office, was an attempt to deprive the plaintiff of its property without due process of law, and was therefore void."
>
> Nobel vs. Union River Logging Co., 147 U. S., 165.

IV.

Conclusion.

Plaintiff's case is based upon the doctrine that where an entryman or selector has done everything required of him to do to perfect his right to the land, but fails to attain it through an erroneous construction of the law by the Land Department, who patent the land to another, the latter can, in equity, be held as his trustee, and compelled to make a conveyance of the legal title.

> Johnson vs. Towsley, 13 Wall., 72.
> Silver vs. Ladd, 7 Wall., 219.
> Stark vs. Starr, 6 Wall., 402.

This argument needs no elaboration. When on March 14, 1905, the plaintiff exercised his vested right to make a lieu selection, and selected the land in controversy, he did all that was required of him to do in order that his rights in and to the selected land might vest. The Land Department refused at all times to accede to his demands for the approval of the selection and the patenting of the lands to him, but patented the land to the defendant, who applied for and received the land, knowing at all times of plaintiff's claim and right thereto. The jurisdiction of the Land Department being now at an end, the jurisdiction of the courts has attached, and they can do that which in Cosmos Exploration Co. vs. Gray Eagle Co., 190 U. S., 301—a much misunderstood case—the court could not do, *i. e.,* find that the complete equitable title to the selected land vested when the selector had so complied with all the conditions of entry, and that the Land Department had no power, by a misconstruction of the statute, to divest a right so vested.

Respectfully submitted,

E. O. MILLER and

W. H. MORRISSEY,

Attorneys for Plaintiff and Appellant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 711.

T. L. ROUGHTON, *Plaintiff in Error,*

vs.

HARRY L. KNIGHT, *Defendant in Error.*

ERROR TO THE SUPREME COURT OF CALIFORNIA.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

May it Please the Court:

While the writer does not believe that the question as to when the title passed from the relinquisher to the Government is important, inasmuch as the effect of recording the deed of relinquishment to the United States has been interpreted by the courts as well as by the Department, it has

been suggested to me that it might be well to call the court's attention to this phase of the question.

The point was as to whether or not the land was subject to taxes after relinquishment.

But in the opinion of the writer it does not make any difference. Suppose after the deed of relinquishment had been recorded it had been found that there was some defect in the title which could be cured, such as a lien for back taxes, nevertheless the recording of the deed would be a manifestation of his intention to accept the offer of the Government which the writer thinks is all that is necessary.

Copy of decision of First Asst. Secretary of date Sept. 9, 1910, in Boise 07934:

> "Appellant contends that no taxes are due for the year 1906, for the reason that the land had been conveyed to the U. S. prior to the time the lien for taxes for that year had attached and that, in determining whether lands relinquished to the U. S. in forest reserves in Arizona are subject to taxation by the State, the decision of the Supreme Court of Arizona must govern, which holds that in the relinquishment of lands in forest reserves, under the act of June 4, 1897, the legal title vests in the U. S. immediately upon the filing for record of the deeds of relinquishment, and further, that lands so acquired between the first and final steps of taxation are exempt from taxes during the year in which they are acquired. It has also been held that although by the statute of Arizona taxes are a lien upon the property assessed as of the first Monday in February of each year, yet the tax rate is not fixed until the third Monday in August, and the levy and assessment is not completed until the duplicate assessment roll is prepared; that lands acquired by the U. S. during those periods are not assessable. Territory of Arizona vs. Ferrin (9 Arizona Report, 316).
>
> "The Department, in its instructions to your office of Feb. 17, 1906, relative to your conduct with ref-

erence to such cases, called attention to that decision and directed that your office will be governed by the rule announced therein.

"Under that rule the title to the base lands vested in the U. S. May 31, 1906, and said lands are not subject to taxation for that year."

COPY.

(Civil No. 900. Filed November 15, 1905.)

(83 Pac. 361.)

TERRITORY OF ARIZONA, at the Relation and to the Use of Thomas Devine, Treasurer and *ex-Officio* Tax-Collector of Coconino County, Plaintiff and Appellant, v. EDWARD B. PERRIN, Defendant and Appellee.

1. Public Lands—Forest Reservations—Relinquishment of Reserve Lands by Owner—Title—Vests in United States Immediately—Act Congress June 4, 1897, Chap. 2, 30 Stats. 30, Construed.—Where an owner of land within a forest reserve executed a deed of relinqnishment to the United States to such land under the act of Congress, *supra*, providing "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may,—relinquish the tract to the government, and select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent," the title vested in the government upon the filing of the deed for record, there being nothing in the act which makes the vesting of title dependent upon the selection of land granted in lieu thereof.

2. Taxes and Taxation—Lands subject to—Act Congress June 4, 1897, chap. 2, 30 Stats. 36, Cited—Rev. Stats. Ariz. 1901, Par. 3855, and Tit. 62, Chap. 5, Construed.—Where the owner of land executed a deed of relinquishment to the United States under the act

of Congress, *supra*, providing for the relinquishment of lands within a forest reserve and the selection of other vacant lands in lieu thereof, and the deed was recorded January 31, 1903, and the secretary of the interior approved the abstract of title and selection of lieu land in April, 1903, land relinquished was not assessable against the owner for the year 1903, although paragraph 3833, *supra*, makes taxes a lien on the property assessed, as of the first Monday in February of each year, inasmuch as the tax rate is not fixed until the third Monday in August of each year, and the levy and assessment is not completed until the duplicate assessment-roll is prepared and certified as provided by chapter 5, *supra*.

3. Same—Lands acquired by the United States—exempt to tax void.—Lands which have become the property of the United States at the time taxes are levied and assessed are no longer subject to taxation, and the acts of taxing officers levying taxes thereon are void and of no effect.

APPEAL from a judgment of the District Court of the Fourth Judicial District in and for the County of Coconino. Richard E. Sloan, Judge. Affirmed.

The facts are stated in the opinion.

Edward M. Doe, for Appellant.

Joseph H. Kibbey, for Appellee.

CAMPBELL, J.—This is an action brought by the territory of Arizona, at the relation of the treasurer and *ex-officio* tax-collector of Coconino County, against Edward B. Perrin. The action is brought under the provisions of act No. 92, page 148, of the legislative assembly of 1903, to enforce against certain lands the taxes levied thereon for the year 1903. The appellee was in April, 1902, and for some years prior thereto had been, the owner of the lands upon which taxes were sought to be imposed. Said lands were em-

braced within the odd numbered sections within the general limits of the Atlantic and Pacific Railroad land grant, and, while not owned by the United States, were within the exterior limits of what was then and is now the San Francisco Mountain Forest Reserve, a forest reserve theretofore duly established by the president of the United States. During the month of December, 1901, and up to the month of April, 1902, appellee had correspondence with the Secretary of the Interior of the United States, looking to the acquisition by the United States of the land held by the appellee, that the same might be incorporated in and become a part of the forest reservation. He made a proposition to the department of the interior, offering the relinquishment to the United States the lands in question, and to select in lieu thereof vacant unappropriated public lands within certain prescribed limits, and in the manner provided by the act of Congress of June 4, 1897, 30 Stats., 36, chap. 2. There were certain outstanding contracts granting the right to cut timber from a portion of the lands involved, and at the instance of the secretary of the interior the appellee agreed to use his good offices in securing from the holders of these timber privileges compliance with rules and regulations to be prescribed by the interior department. Forms of deeds of relinquishment were submitted by the appellee to the secretary of the interior, and provided by that officer. The proposition made was accepted by the Secretary of the Interior in April, 1902, and subsequently, in the same month, the President of the United States, at the request of the Secretary of the Interior, issued his proclamation incorporating into the reserve the lands of appellee. It was a part of the agreement entered into with the Secretary of the Interior that the appellee should as soon as practicable execute to the United States deeds of relinquishment of said lands. These deeds were so executed, and on the thirty-first day of January, 1903, were caused to be recorded in the office of the recorder in the county in which the lands are situated, and abstracts of title to the said lands were furnished to the Secretary of the Interior at his request. Thereafter, in April, 1903, the Secretary of the Interior approved the said abstracts of title and the deeds of relinquishment, with the exception of a small part of the land conveyed, which at the time this

action was tried in the court below had not yet been approved. After the agreement reached by correspondence and the proclamation of the President, appellee in no wise attempted to exercise any claim or control over the lands but they were and remain under the complete control of the Secretary of the Interior, and are and have been in all respects treated as a part of the forest reservation.

It is contended by the appellant that, although the deeds of relinquishment were filed and recorded on January 31, 1903, the Government took no title to the lands until the deeds and abstracts were approved by the Secretary of the Interior, and the selection of the lands in lieu of those relinquished were made by the appellee and approved by the land department of the government, and, as such selections and approvals were not made until after the first Monday in February, 1903, the lien for taxes for the year 1903, by virtue of the provisions of paragraph 3833 of the Revised Statutes of Arizona, of 1901, attached to the lands on the first Monday in February in that year. The Act of June 4th, 1897, under which the lands were relinquished to the government, provides: "That in cases which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limit of a public forest reservation, the settler or owner thereof may, if he desired to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent." It will be observed that the act itself makes no provisions as to the manner in which the relinquishment to the government shall be made. The whole subject is left under the control of the land department of the government. Cosmos Exploration Co. vs. Gray Eagle Oil Co., 190 U. S., 301, 23 Sup. Ct., 692, 24 Sup. Ct., 860, 47 L. Ed., 1064.

There is nothing in the act of Congress which makes the vesting of the title in the United States of the relinquished land dependent upon the selection of the lands granted in lieu thereof. The appellant urges that, this being an exchange of lands, the title does not vest in the government until the selection of the lieu lands has been made and approved. We are unable to agree with this contention. In our view of the statute, the legal title vested in the United

States immediately upon the filing for record of the deeds of relinquishment, subject, perhaps, to be divested should the Secretary of the Interior disapprove the abstracts of title. The Consideration for the grant is the right, under the law, to select other lands in lieu of those relinquished. After the deed is recorded and delivered, the grantor can not, by any act of his, encumber the title as against the United States. He has no right to the land which he can not enforce.

We have carefully examined the opinion of the Supreme Court in the case of Cosmos Exploration Co. vs. Gray Eagle Oil Co., *supra*, relied upon by appellant, and find nothing there in conflict with these views. The question there presented was the time when the title vested to lands in lieu of lands relinquished, and the court held that such title vested only after the approval of the selection by the land department of the government.

There is another reason why this action must fail, at least as to the greater part of the lands involved. The Secretary approved the abstracts of title, and, so far as the record discloses, the selection of the lieu lands, in April, 1903, under the provisions of the laws of Arizona, the tax rate is not fixed until the third Monday in August of each year, and the levy and assessment is not completed until the duplicate assessment-roll is prepared and certified, as provided by chap. 5 of title 62 of the Revised Statutes of Arizona of 1901. When in April, 1903, the Secretary of the Interior approved the abstracts of title to the lands, and, so far as the record shows, the lieu selections were made and approved, all had been done that even the appellant contends should be done to vest the full legal and equitable title in the United States lands acquired for public purposes during the period between the first and final steps of taxation are exempt from taxes levied during the year in which they are acquired. Bannon v. Burns (C. C.), 39 Fed., 892; Gachet v. City of New Orleans, 52 La. Ann., 813, 27 South, 348; Buckhout v. City of New York, 176 N. Y., 363, 68 N. E., 659. And this is true even where, as in this territory, the legislature has declared that a lien for taxes shall attach at a date prior to the time when the first steps are

taken to subject the real estate to taxation. There can be no real or effective lien until the amount of the taxes is ascertained and assessed. "In the nature of things, no tax or assessment can exist, so as to become an encumbrance on real estate, until the amount thereof is ascertained and determined." Black on Tax Title, Sec. 189; Dowdney *et al.* v. Mayor, etc., 54 N. Y., 186. And see Gillmore v. Dale, 27 Utah, 372, 75 Pac. and 932. Under such provisions of law, when the rate of taxes is fixed and the amount determined and levied, the lien for such amount relates back and attaches as of the date specified in the statute. McLaren v. Sheble, 45 Mo., 130; Reeve v. Kennedy, 43 Cal., 643; Cochran v. Guild, 106 Mass., 29, 8 Am. Rep., 296; Gillmore v. Dale, 27 Utah, 372, 75 Pac. 932. In the case at bar, the lands having become the property of the United States at the time the taxes were levied and assessed, and no longer subject to taxation, the acts of the taxing officers were void and of no effect.

For the foregoing reasons, the judgment of the lower court is affirmed.

KENT, C. J., and DOAN, J., concur.

Respectfully submitted,

W. P. FENNELL,

Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 711.

T. L. ROUGHTON, *Plaintiff in Error.*

vs.

HARRY L. KNIGHT, *Defendant in Error.*

ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

This case grows out of the Conservation policy of the government.

When Congress first authorized the President to withdraw from settlement large bodies of land, in his discretion, which should be formed into "Forest Reserves," no provision was made for persons who had already become settlers in such forests or who had acquired title to land

afterwards included within the limits of a Forest Reserve. These people and these lands were so effectually conserved as to be rendered incommunicado. To remedy this evil the act of June 4, 1897, was passed.

The act of June 4, 1897, commonly called the "Forest Reserve Lieu Land Law," provides:

> "That in the case in which a tract covered by a patent is included within the limits of a public forest reservation * * * the owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his * * * patent."

On March 3, 1905, Congress repealed the foregoing provision of the act of June 4, 1897.

The question before the court is: **What was the status of those who relinquished their land to the government and tendered their deed in the manner the Secretary prescribed before the repeal of the act of June 4, 1897,** but filed their applications for the lieu land after its repeal?

Many questions of law have been injected into this case, such as:

When did the title pass to the government?

Did recording the deed operate so as to pass the title?

Must the government **accept** the title in order that a contractual obligation may arise?

All these and like questions are not decisive of the real question.

This case comes here by Writ of Error from the Supreme Court of California.

Plaintiff in Error filed his Bill in Equity in the Circuit Court of Kern County, California, alleging, in substance, that he was the owner of certain lands, therein described,

which lands were included within the limits of a Forest Reservation and that he was entitled to the benefits of the Act of June 4, 1897;

That in pursuance of the provisions of said act and in accordance with the regulations and directions of the Secretary of the Interior he duly executed a deed to the United States relinquishing his title to said lands and recorded the same in the proper office for the recording of deeds in the county where the land is situated;

That he procured an abstract of title to said land showing that a clear and unencumbered title became vested in the United States by his deed of relinquishment;

That he delivered said deed and abstract of title to the Register and Receiver at the nearest public land office of the United States and

The same were transmitted to the Commissioner of the General Land Office at Washington, D. C., and by him were duly received;

That all of which was had and done prior to March 3, 1905 (the date of repealing act);

That after March 3, 1905, he duly selected in the manner prescribed certain other lands, describing them, in lieu of said land which he had previously relinquished to the United States, and

That he filed his application in the proper local land office for a lieu selection which was duly forwarded to the Commissioner of the General Land Office, and that the selected land was free and open to settlement;

That the defendant (defendant in error here) had full knowledge of said proceedings and well knew of the plaintiff's rights in the premises.

That nevertheless defendant wrongfully initiated certain proceedings in the General Land Office to acquire the title to said lands, but which proceedings were subsequent in time to plaintiff's location and selection thereof;

That the Department rejected plaintiff's selection not through any objection to the title to the relinquished land or to the character of the land selected therefor, but solely on the theory that the Act of June 4, 1897, had been repealed between the dates of the relinquishment of the base land and the date of the selection of the lieu land, and for that reason alone awarded the land to the defendant in error and issued to him a Patent therefor.

The prayer of the bill was that the defendant might be decreed to hold the naked legal title in trust for the plaintiff and might be required to convey the same to him.

DEFENSE.

A general demurrer was filed to this bill which the trial court sustained and dismissed the bill for want of equity, whereupon the plaintiff appealed to the Supreme Court of California, which court affirmed the decision of the trial court and the plaintiff brings the case here by writ of error.

The Secretary of the Interior denied plaintiff's application upon a mistaken view of the law, as set forth in the case of Moses, 34 L. D., 458, and the Supreme Court of California expressly adopted and followed said decision.

The construction of the law by the Secretary as expressed in the Moses case is as follows:

> "It is a general principle in the law of real estate that title does not pass until the deed is delivered to the grantee.
>
> "Though acceptance of a title conveyed is, under some circumstances, presumed from its being beneficial to the grantee, it will be seen from examination of such cases that there was a lapse of time with an entry into possession by the grantee or other evidence of circumstances raising a presumption of the grantee's acceptance of the conveyance. No case is cited, and

none has been found by the Department, where acceptance of a conveyance of title is presumed from mere filing of the conveyance for record by the grantor. If the grantee is bound to render an equivalent or consideration for the conveyance, it is manifest that to hold the grantee obligated to pay a consideration where he has not received the conveyance is unsound in principle as creating a contract which the grantee never actually considered or determined to enter into.

"The act of June 4, 1897, was a mere proposal for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the Land Department."

The California Supreme Court, in its opinion in this case, quoted with approval a large portion of the Secretary's decision in the Moses case.

As the court follows the Secretary we must look for precedents in the decisions of the Secretary in like cases.

The case of Mary E. Coffin, 31 L. D., 175, is a precedent established by the Secretary.

Mrs. Coffin being the owner of land which was then within the limits of a Forest Reserve relinquished her land to the government, but she made no selection of lieu land at that time.

In fact after she relinquished her land the President by proclamation so changed the boundaries of the Reservation that Mrs. Coffin's land was not within the boundary of a Reservation at all at the time she made her lieu selection.

Surely this raised the question of contemporaneous selection.

In this case the Secretary said:

"Mrs. Coffin could not have known, and could not have been required to anticipate, at the time of executing and recording the deeds of relinquishment, that

the president would, by proclamation, within a few days thereafter, change the boundaries of the forest reservation in such a manner as to exclude the relinquished lands from the limits of the reservation. Until her deeds of relinquishment were recorded the matter was wholly within her control, **but after that was accomplished the title to the land appeared, by the county records, to be in the United States.** Even if the deeds of relinquishment have to be accepted by the proper officers of the Land Department before they will be fully effective as conveyances to the United States, nevertheless the record of the deeds in the recording office of the county where the lands are situate constitutes a serious cloud upon Mrs. Coffin's title and will seriously impair her opportunities to sell or otherwise dispose of the lands.

"Congress has provided no means for reconveying the lands to her, and she cannot, without the permission of Congress, which has not been granted, bring a suit against the United States to cancel the deeds or remove the cloud from the title.

"**The situation here disclosed should have been anticipated and provided for in the instructions or regulations issued under the lieu land act, but this was not done, and the case must therefore be dealt with in a manner which will do justice in this unexpected contingency,** if that can be done without violating any provision of the lieu land act or other act of Congress.

"As Mrs. Coffin can, under existing legislation, neither obtain a conveyance from the United States nor a decree canceling her deeds of relinquishment, the only course open is to permit her to complete the exchange of land, which was begun by her and partially completed, in full conformity with the lieu land act and the regulations thereunder, and which would have been carried to completion within a reasonable time, but for the proclamation of the President excluding from the forest reservation that portion thereof which included the relinquished lands.

> "It is believed that it is within the competency of the Secretary of the Interior to give effect to the equities of Mrs. Coffin's claim and to permit a completion of this exchange."
>
> Williams vs. United States, 138 U. S., 514, 524.

The same construction has been given to similar acts in many cases, thus:

The Act of June 22, 1874, for the relief of Railroad Companies provides that where lands within the limits of a grant to a Railroad Company were in the actual possession of settlers the Railroad Company would be allowed to select other land in lieu thereof. A case came before the Secretary involving the precise question in this case.

By the act of September 29, 1890, the unearned portion of the railroad grants were declared forfeited.

The Railroad Company, as in this case, had relinquished certain land occupied by settlers prior to the forfeiting act, but had not made a selection of land in lieu thereof.

It was argued in that case, with a much better show of reason, that Congress having declared the grant of the **base land forfeited** no valid rights to a lieu selection could be based thereon, but the Secretary said:

> "For such lands as had been relinquished to the United States under the act of 1874 **the company had acquired a vested right of selection and subsequent legislation could not operate upon such rights.** Were it plain that Congress intended by the act of 1890 to forfeit such rights a question of constitutional law on the power of that body would arise, over which this Department would have no jurisdiction, but it is a familiar rule of statutory construction that the legislative power will not be presumed to have intended that which it did not have authority to do." 22 L. D., 560; 23 L. D., 565.

Indeed, there are today many outstanding "Settlers' Rights" under the act of July 1, 1898, where the land has been relinquished to the Railroad Company and approved by the Commissioner, but no lieu selection has been made.

As said by this Court in Humbird vs. Avery, 195 U. S., 509:

> **"The Land Department was not required to complete its administration of the statute within any designated time."**

The Supreme Court in Humbird vs. Avery, 195 U. S., 506, also said:

> **"In case of such relinquishment by the railroad company, it acquires a right to select other lands in place of those retained by the individual claimant."**

The same may be said as to the act of June 4, 1897.

Neither the statute nor the regulations of the Department required the lieu selection to be made within any designated time; on the contrary **the established practice permitted that the selection might be made any time after the relinquishment and such practice became a rule of construction of the act upon which the public had a right to rely.**

It was the common practice of the General Land Office to permit owners of large tracts of land within Forest Reserves to relinquish the same to the United States and furnish abstracts of title which were examined and approved and stood to the credit of the relinquisher who afterwards could sell the right of lieu selection in small areas by issuing Powers of Attorney for that purpose.

The Santa Fe Railroad has been selling its lieu rights on the open market in that way both before and since the repeal of the act.

Were the owners of these large tracts ever required to make the lieu selection contemporaneous with the relinguishment? No.

Perhaps the Department would contend, if it were represented here, that this custom prevailed in consequence of certain contracts between the Railroad Company and the Secretary, which contracts were not impaired by the repealing act.

But the benefits of the Act of June 4, 1897, were indiscriminately offered to the public at large, that is to those who were owners of land within a Forest Reserve, no special advantage in matters of practice could accrue to one more than to another, besides the custom of relinquishing the base land, as it was called, and afterwards making the lieu selection **was a common practice** and was not confined to those with whom the Secretary had made contracts.

In the case of Lars Winquist, 4 L. D., 324, Secretary Lamar uses the following language:

> "* * *, or if rights have vested which were valid under any rule of law of the Department as administered or expounded at the time such rights were acquired they can not be divested or impaired by the act of any succeeding Commissioner or Secretary."

In U. S. vs. Burlington, 98 U. S., 198, the Court says:

> "Such has been the uniform construction given to the acts by all Departments of the Government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction.
>
> **"This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision.**
>
> It cannot at this day be called in question."

In Bale Refrig. Co. vs. Sulsburger, 157 U. S., 34, the Court says:

> "* * * especially if there be reason to suppose that vast interests have grown up under that practice and under judicial decisions which may be disturbed or destroyed by the announcement of a different rule."

Secretary Lamar, in Ranch San Rafael (4 L. D., 482), said:

> "Unless the principle of *res judicata* is recognized, administrative action may become involved in chaos; the labors of the Department would become too cumbersome to admit of their intelligent discharge; **uncertainty would cloud every inchoate title, and, in many instances, vested rights would be endangered.** Our present duties are amply sufficient to command our whole time and attention without entering unnecessarily into the inquiry as to the intelligence with which every past duty was performed." See references cited.

In Germania vs. James (89 Fed., 817), it was held:

> "Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul **rights acquired under this rule or practice, or to deprive Hartman of his title to this land, by a retroactive decision. * * * They might undoubtedly have made and promulgated a new rule which would have governed cases arising after a new rule of practice had been made and become known. * * * Retroactive decisions of judicial tribunals are as vicious and ineffectual as retroactive laws."**
>
> Shreve vs. Cheesman, 32 U. S. App., 676, 689.

> **"System, order, and the uniform application of the laws, the rules and the practice to all litigants alike, are as essential to the administration of justice in the Land Department as in the Courts."**
>
> See U. S. vs. Winona & St. P. R. R. Co., 67 Fed., 948.

In Olcott vs. Supervisors (16 Wall., 678), it was held:

> "Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rules. See, also, Anderson vs. Santa Anna, 116 U. S., 356; German Bank vs. Franklin, 128 U. S., 539; Loeb vs. Trustees, 179 U. S., 472, 491-92, and authorities cited; Ohio vs. Debolt, 16 How., 416; Gelpcke vs. Dubuque, 1 Wall., 175."

In U. S. vs. Alabama G. S. R. Co. (142 U. S., 615), it was held as follows:

> "It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the Department charged with execution of such statute, and, if such construction be acted upon for a number of years, **will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive. * * * These principles were announced as early as 1827 in Edwards vs. Darby, 12 Wheat., 206, and have been steadily adhered to in subsequent decisions."**

In St. Paul M. & M. Ry. Co. (8 L. D., 255, 263), Secretary Vilas held as follows:

> "The effect of a change of decision in reference to a question of interpretation, when property rights have arisen, have been fully determined by the Supreme Court. That tribunal has recognized the right of the Supreme Court of a State to interpret the constitution of the State and the validity of the laws enacted

thereunder; but it is held in the case of municipal bonds that where, at the time of the loan and issue of such bonds, the decisions of the State court upheld the validity of the law which authorized them, a later decision, denying the constitutionality of such law cannot be admitted to destroy the obligation in the hands of parties who have bought them upon the faith of the earlier decisions. Thompson vs. Lee County, 3 Wall., 327; Kenosha vs. Lamson, 9 Wall., 277; Gelpcke vs. Dubuque, 1 Wall., 175; Mitchell vs. Burlington, 4 Wall., 270. The doctrine of these cases is applicable to the question now under consideration, and must be taken in connection with the other principle referred to as rendering it obligatory upon the Department to respect the later adjudication of the Department affecting the right now involved, to the same extent as if it were the only opinion ever promulgated by the Department, because all the consequences in destruction of property rights upon the faith of a decision attach only to the latter."

In C. P. Masterson (7 L. D., 577), on page 578, Secretary Vilas says:

"It has been held by the Department that where a decision operates to change a practice or rule well established, especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation are necessarily illegal. See, Minor vs. Marriott, 2 L. D., 709; Allen vs. Cooly, 5 L. D., 261; Cudney vs. Flannery, 1 L. D., 165."

In Minor vs. Marriott (2 L. D., 709), Secretary Teller said as follows:

"The rule of this decision should not operate to interfere with or take away any rights acquired under

the law as it has heretofore been construed by your office. Though that construction is, in my opinion, clearly erroneous, such fact does not render illegal any acts which have been performed in accordance with and pursuant to that construction or interpretation. Until a rule is changed it has all the force of law, and acts done under it while it is in force must be regarded as legal." See, also, Henry W. Fuss, 5 L. D., 167, in regard to change of rule relating to desert land assignments. Also opinion of former Assistant Attorney-General Vandevanter, 27 L. D., 91.

On September 15, 1889, acting Secretary Muldrow (L. D., 145), instructing the then Commissioner as to desert land entries, said:

> "For the sound and true rule is that if the contract when made was valid by the law as then interpreted and administered, its validity and obligation can not be impaired by any subsequent decision altering the construction of the law." See, also, Edwin L. Frost, 21 L. D., 38; George Bigknife, 13 L. D., 511.

In the case of James B. Weaver, 35 L. D., 553, Secretary Garfield, on page 557, said:

> "It will therefore be seen from what has heretofore been stated that from the date of the Shortt decision down to the time when you rendered decision therein the rule had been as announced in the former case. Commutation entries thus made were allowed under the authority of the Land Department, and rights arising thereunder should not be disturbed by reason of a later construction of the law. Especially is this true where it appears that, relying upon the former construction, and an entry allowed thereunder, rights of third parties have intervened that can not be protected if action taken under the former construction is to be ignored."

Secretary Garfield in Roy McDonald (36 L. D., 205), on page 209 said:

> "The decisions clearly show that sudden changes in the construction of statutes, by those charged with their enforcement, are looked upon with disfavor, especially where a construction favorable to the individual has been acted upon and the change is made in such manner as to become retroactive."

In Douglass vs. Pike (101 U. S., 687), it was held as follows:

> "After the statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change in decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a State court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons or because of the change of opinion in respect to old ones and ordinarily we will follow them, except so far as they affect rights vested before the change was made." See, also, Taylor vs. Ypsilanti (105 U. S., 72); Ralls County vs. Douglass (105 U. S., 733); Green County vs. Conness (109 U. S., 105); New Buffalo vs. Cambria (105 U. S., 73); Boyd vs. Alabama (94 U. S., 645).

In Shreve vs. Cheeseman, 69 Fed., 786, on page 791, it was said:

"Moreover there are no decisions to which the maxim *stare decisis et non quiete movere* applies more universally, or with more salutary effect, than to those which construe statutes that establish or declare rules of property. **It is universally conceded that it is often more important that these rules should be certain and changeless than that they should be right. Men engaged in active business buy and sell in reliance on them.** Lawyers advise their clients and enforce and protect their rights with constant reference to them: and while interests will readily adjust themselves to and protect themselves under erroneous rules, there is neither protection nor safety for any interest under shifting rules. Seale vs. Mitchell, 5 Cal., 402, 403; Bates vs. Relyea, 23 Wend., 336; Goodell vs. Jackson, 20 Johns., 693."

The United States Supreme Court, in Kean vs. Calumet, 190 U. S., 460, said:

"It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not new. For twelve years the decision in Hardin vs. Jordan and Mitchel vs. Smale has stood as authoritative declarations of the law. * * * Meantime, many titles must have passed on the faith of those decisions. * * * It seems to us that it would be likely to do more harm than good to allow them to be called in question."

Cooley, in his Constitutional Limitations (7th ed., p. 86), says:

"Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property so that titles have been acquired on reliance upon it, and vested rights will be disturbed by any change, for in that case it may be better that the correction of the error be left to the legislature, which can control its action so as to make

it prospective only, and thus prevent unjust consequences" (numerous cases cited).

"The court can not retrace their steps without committing a new error nearly as great as the one at first." Sparrow vs. Kingman, 1 N. Y., 260; Emerson vs. Atwater, 7 Mich., 12; Rothschild vs. Grix, 31 Mich., 150; Loeb vs. Mathis, 37 Ind., 306.

"It is true that when a principle of law, doubtful as to its character or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established." Pratt vs. Brown, 3 Wis., 609; Taylor vs. French, 19 Vermont, 49; Bellows vs. Parsons, 13 N. H., 256; Hamil vs. Smith, 15 Ohio, 134.

A offers B an exchange of property and A tenders his deed on his part. **The tender is a sufficient basis for a Bill for specific performance whether the title passed or not.**

The tender of the title to the base land is the basis of the lieu right, not its acceptance. Hepburn vs. Auld, 1 Cr. 321. But in this case the deed was delivered and accepted, for examination at least, just where and as the Secretary directed.

It is well settled that a voluntary offer may be withdrawn at any time before acceptance but not afterwards.

What was necessary to entitle one to the benefits of the act of June 4, 1897?

First: To be an owner of land within a Forest Reserve.

Second: To relinquish his land back to the Government. Nothing more.

The examination of his abstract of title and accepting the same as a basis of lieu selection were mere incidents in the consummation of the transaction, but upon which the rights of the parties in no way depended.

Suppose the Secretary had upon the examination of the abstract of title refused to accept a good title on a frivolous objection of one of his law clerks, would such refusal bar the right?

But great stress is laid upon the decision of this Court in the case of Cosmos Company vs. Gray Eagle Oil Company, 190 U. S., 301.

That case was decided on two well-established principles:

First: That the Secretary of the Interior has peculiar and exclusive jurisdiction over questions of fact concerning the physical character of any portion of the public land and that his decision on that point will not be disturbed by the courts.

The question in that case was whether the land in question was oil land or agricultural land.

Second: That the jurisdiction of the Secretary over any particular tract of land extends and continues until a patent is issued or refused, and then his jurisdiction ceases.

In the Gray Eagle Oil Company's case the character of the lieu land was the decisive issue in the case.

That was a question of fact, not of law, and the matter was still within the jurisdiction and control of the Secretary and had not been decided by him. The selector under the Forest Reserve Act rushed into Court before the Secretary had acted on his application and while the matter was still pending.

The case at bar differs from the Gray Eagle Oil Company's case in this:

First: The jurisdiction of the Department had ceased by the issuance of the patent.

Second: It is alleged and admitted in the Bill in this case that the sole issue before the Secretary was **a question of law, not a question of fact** as to the character of the land.

In the very first paragraph of the decision in the Gray Eagle Oil Company's case, Judge Peckham, speaking for the court, says:

"An examination of the Complainant's bill shows that it does not ask for an injunction until the decision of the Land Department upon the matter pending therein.

"The Complainant ignores those proceedings so far as to claim now the final adjudication by the Court.

"* * * The Court is, therefore, called upon in advance of and without reference to the action of the Land Department to determine complainant's right and title to the three-quarters interest in the selected land and a final decree is asked determining the interest of the parties in this land, **while the question in relation to the title is still properly before the Land Department and not yet decided. This we cannot do."**

"The **General Land Office has (so far as this record shows) come to no conclusion in regard to it."**

"Its decision of any legal question would not, of course, be binding on the Courts whenever such a question might properly arise in any future litigation."

It follows from a fair analysis of that decision that the question of **when** the equitable title to the lieu land vested was not the question in that case.

The Land Department decides whether it vested at all or not, and if its decision is based upon an erroneous construction of the law and not upon a question of fact the Courts are open to litigants after the Department has decided the case one way or the other.

Thus in Thayer vs. Spratt, 189 U. S., 346, the doctrine is declared:

"The decision of the Land Department as to the character of the land in question **resulted from an erroneous construction of the timber act of June 3, 1878. * * * In this construction the Department made a legal error."**

So in the case at bar. **The sole question before the Department was whether the lieu selection had been made in apt time.**

This was a question of law which the Courts will review.

If the foregoing analysis of the law is correct, it follows that the question is not whether plaintiff in error acquired a full and complete equitable title or not by the mere act of relinquishment without any determination on the part of the Land Department either favorable or unfavorable as was contended in the Gray Eagle Oil case, but when the Land Department has exhausted its jurisdiction and denied the plaintiff's right by an erroneous construction of the law in proceedings had before it, and when a contrary and true construction of the law would have given the patent to the plaintiff instead of to the defendant, surely that presents a case for the Courts to decide.

This becomes still more apparent when it is remembered that a United States Patent for land is only a quit claim deed and that the rule *Caveat Emptor* always applies to one taking title to government land.

Besides the decision in the Gray Eagle Oil Company's case was not final, that is, it did not conclude the rights of the parties.

It was expressly stated in the decision that it was without prejudice to a new action when the parties could properly come into Court.

There is not a case in the books against the holder of a United States Patent that is not based on an allegation of equitable ownership.

How could there be?

If this construction of the law were not correct how could anyone ever get the question before the Court?

The successful Contestant before the Land Department always gets the legal title. There is no direct appellate jurisdiction.

How **can the unsuccessful Contestant ever get into Court if he has not acquired equities in the thing which is the subject of the suit?**

Johnson vs. Towsley, 13 Wall., 72.

From the opinion of the Court in Rector vs. Gibbon, 111 U. S., 290, Mr. Justice Field speaking for the Court said:

> "This question was fully and thoughtfully considered in Johnson vs. Towsley, 13 Wall., 72."
>
> "In that case the direct question was as to the effect to be given to the tenth section of the act of June 12, 1858. It was held * * * that after the title had passed from the government, and the question had become one of private right, the jurisdiction of Courts of equity might be invoked to ascertain if the patentees did not hold in trust for other parties; and if it appears that the party claiming the equity had established his right to the land upon a true construction of the acts of Congress and by an erroneous construction, the patent had been issued to another, the Court would correct the mistake."

The repeal of an act does not affect any right which has accrued under it.

Thus the repeal of a statute imposing a succession tax is no defence to an action for the recovery of such tax even though nothing had been done toward the collection thereof. The fact of death prior to the repeal determines the liability. Trippet vs. State, 149 Cal., 521.

The writer has been unable to find a case involving the precise question herein. The cases under allied subjects, such as part performance of contracts, options, tender of purchase money, vested rights, equitable title, etc., are all begging the question here.

It is a question of an offer made and accepted and the price paid before the offer was withdrawn.

Such cases should be considered pending by a liberal construction of the saving clause of the repealing act. True, the application was not on file, but the preliminary steps had been taken as directed by the Secretary, the base land had been relinquished, the price paid and in the manner directed.

Suppose the application had been filed in the local office and was in transit when the repealing act was passed the application would not by a strict construction be pending in the General Land Office, still who would say that Congress did not intend to include such cases?

We do not, however, wish to be understood as admitting that the intention of Congress would control.

On the contrary we contend that a contractual obligation arose from the time the offer was accepted by paying the price, that is, by relinquishing the base land, that Plaintiff in Error acquired a right to a specific performance; that by filing his application for lieu selection after the repeal of the act he took the necessary steps to obtain final action by the Land Department; that its action being adverse and final by rejection of his application, on the ground that the act had been repealed, and awarding the land to defendant, he admitting by his demurrer that he was fully advised of plaintiff's rights—all open the doors of Courts of Equity to correct this mistake of law.

The act of June 4, 1897, was a remedial act. And being a remedial act it should have been liberally construed.

In like manner when the act was repealed **that clause which was intended to preserve the rights of pending cases should have received a broad construction instead of the strict and narrow and technical construction which has been given it by the Department.**

The act of March 3, 1905, repealing the act of June 4, 1897, contained the following saving clause:

> "That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patent issue therefor, the same as though this act had not been passed, and if for any reason not the fault of the party making the same, any pending selection be held invalid another selection for a like quantity may be made in lieu thereof."

If we consider that this repealing act was tacked on to the annual appropriation bill in the last hour of the last day of the session and could have received no consideration whatever, it will be presumed that had the attention of Congress been called to it, the language would have been so changed as to make its meaning clear as to what constituted **a pending selection.**

The deed to the base land had been delivered to the Commissioner and was then in his possession. **The matter was pending in the General Land Office even though the application for lieu selection had not been filed.**

Under the equitable doctrine of relation the right of selection vested as of the date of delivery of the deed of relinquishment and the selection when made reverts back to that date.

The fallacy of the Secretary's argument, followed by the court, consists in transposing the parties to the Contract.

The Secretary supposes the relinquisher to be the proponent and the Government the acceptor; whereas the contrary is the true position. The Government holds out the proposition and the relinquisher accepts it, the rest is a matter of specific performance.

The Plaintiff in Error was entitled to the relief sought.

Respectfully submitted,

E. D. F. BRADY and
W. P. FENNELL,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 711.

T. L. ROUGHTON, *Plaintiff and Appellant in Error,*

vs.

HARRY L. KNIGHT, *Defendant and Appellee in Error.*

IN ERROR TO THE SUPREME COURT OF CALIFORNIA.

BRIEF OF DEFENDANT AND APPELLEE.

STATEMENT.

The plaintiff, in his amended complaint, alleges that on June 19, 1899, he filed in the Visalia Land Office a deed of relinquishment to certain land within the Sierra Forest Re-

serve, which, for convenience in this brief, we will call the "base land," accompanied by an abstract of title showing the conveyance of the base land from the United States to the United States. The relinquishment purported to convey the base land to the United States. These papers were transmitted to the Commissioner of the General Land Office. They were returned through the Visalia Land Office to the plaintiff January 9, 1905. "Neither the Commissioner of the General Land Office nor any official of the United States of America ever made any exception either to the form or sufficiency of such relinquishment and deed, or the said abstract of title."

On March 14, 1905, the plaintiff made application for the land in issue, which, in this brief, for convenience, we will call the "lieu land." He refiled the deed and abstract of title which were "accompanied by all certificates or affidavits required by law and the rules and regulations of the Secretary of the Interior and the Commissioner of the General Land Office."

On November 15, 1907, the United States issued patent to the lieu land to the defendant. The plaintiff, prior to this suit, demanded conveyance from the defendant. The defendant had full notice of all matters charged in the complaint.

The decree asked for is that the defendant be declared a trustee for plaintiff and be required to convey to plaintiff the title to the land.

On August 11, 1909, the Supreme Court of California unanimously affirmed the judgment of the Superior Court of Kern County, sustaining the demurrer to the amended complaint filed by the defendant. This decision, Roughton vs. Knight, 103 Pacific, 844, is printed beginning page 21 of the transcript.

The plaintiff claims that the decision of the California Supreme Court is erroneous, and has appealed, alleging denial of rights in the construction by the Supreme Court of California of the Act of June 4, 1897, and the United States Constitution. The right of action is based upon the jurisdiction of the courts to hold a wrongful holder of a patent a trustee for the equitable owner and under duty to convey.

The plaintiff, so far as we can gather from the three briefs filed by his attorneys, alleges the following errors in the decision of the Supreme Court of California:

First. In not holding that the plaintiff, on June 19, 1899, accepted the offer in the Act of June 4, 1897.

Second. In not holding that the filing of the deed of relinquishment and the abstract of title on June 19, 1899, gave the plaintiff a right to select lieu lands that Congress could not divest, and that the Act of March 3, 1905, so far as it attempts to take away that right, is unconstitutional.

Third. In not holding that on March 14, 1905, the plaintiff's tender entitled him to the issuance of patent for the lieu land and from that date he has been the equitable owner thereof.

Fourth. In not holding that because of the defendant's knowledge of the plaintiff's equitable ownership on November 15, 1907, he took the legal title as trustee for the plaintiff and under duty to convey to the plaintiff.

There was no error in the decision.

ARGUMENT.

We desire to acknowledge at this time the effective aid we received from the brief prepared by George E. Whitaker for the consideration of the Supreme Court of California.

The following propositions are respectfully submitted:

I. The Act of June 4, 1897, 30 Stat., 34, extended an invitation to exchange lands. Until the offeree relinquishes the base land, selects the lieu land, complies with all of the valid, reasonable regulations, and the exchange is approved, there is no change in the legal or equitable status of either tract, and no obligation arises on either side to continue with the arrangement. An exchange may be initiated by filing a deed of relinquishment and selection, and in no other way.

II. The Act of March 3, 1905, 33 Stat., 1264, repeals the Forest Lieu Act of June 4, 1897, 30 Stat., 34, and rejects all uncompleted attempts or proposals to comply with said Act, with the three exceptions spoken of in the repealing Act. The power of Congress over public lands is plenary, and the Land Department has no authority to accept selections after March 3, 1905, not within the exceptions in the repealing act.

III. The most claimed by the plaintiff is an inchoate right to select. Such a right, when recognized, is only a float until selection is definitely made and approved, and until such approval Congress cannot be presumed to have parted with its power to dispose of the land.

IV. The defendant's objections answered specifically.

V. The amended complaint does not state facts sufficient to constitute a cause of action.

I.

The Act of June 4, 1897, 30 Stat., 34, extended an invitation to exchange lands. Until the offeree relinquishes the base land, selects the lieu land, complies with all of the valid reasonable regulations, and the exchange is approved, there is no change in the legal or equitable status of either tract, and no obligation arises on either side to continue

with the arrangement. An exchange may be initiated by filing a deed and selection, and in no other way.

In the case of W. E. Moses Land Scrip & Realty Company, 34 L. D., 458, at 460, the Secretary says:

> "The Act of June 4, 1897, was a mere proposal for an exchange. No contract arises until a selection is made and the conveyance of the base tract is filed in the Land Department. Until it is so filed, the United States can know nothing of it, and no officer, authorized to act on the part of the United States, can determine whether such proposed exchange can be approved or not. There is not only no contract, but no existent facts from which a contract can arise. It rests solely in the one mind of the private owner as something he merely contemplates doing, and there can be, for that reason, no concourse of two minds, which is essential to the relation of contract. Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time, the exchange is not initiated, and is merely a purpose in the private owner's intent."

This case is not different from the case of F. A. Hyde, decided April 14, 1899, before the plaintiff filed his deed of relinquishment. See F. A. Hyde *et al.*, 28 L. D., 284, at 286:

> "The provision of the statute under which this case arises clearly contemplates an exchange of lands. The parties to the exchange are the United States, on the one hand, and the holder of an unperfected bona fide claim within the limits of a forest reservation, or an owner of patent of land so situated. A case is not properly presented for the favorable action of the Land Department under said provision until there is filed a relinquishment to a tract covered by the unperfected bona fide claim or patent and a selection by

> the claimant or owner of the land in lieu thereof. The officers of the Land Department are not authorized to accept, consider, or pass upon the relinquishment of the tract within the limits of a forest reservation except in connection with a proffered or tendered selection of other lands in lieu thereof."

The Land Department has uniformly held to this in the cases we have examined. See, in particular, the case of William S. Tevis, 29 L. D., 576:

> "Paragraphs 15 and 16 of the rules and regulations issued June 30, 1897, under said act, 24 L. D., 589, 592, clearly require that in all cases of exchange of lands under said act, whether the land relinquished be a tract covered by an unperfected bona fide claim or by patent, an application to select lieu lands must accompany the relinquishment of the lands included within the limits of a forest reservation."

Page 577:

> "There is no statute under which title so relinquished or reconveyed to the Government can be returned or restored to the party making the relinquishment or reconveyance—that is to say, such a contingency or situation is wholly unprovided for in the existing legislation. The Department cannot escape the conviction, upon careful consideration, that the act contemplates, and that good administration and the best interests of all concerned in the exchange of lands so provided for require, that the steps necessary to complete such exchange, when once initiated, be concluded as promptly as possible, and that, as contributory to that end, an application to select lieu lands should accompany the papers filed to effect a relinquishment to the United States of the land upon which the lieu selection is based."

We have found no case in the Land Decisions of the Department of the Interior which does not hold that a full application under the Act of June 4, 1897, is as essential as an application for entry.

The Land Department effectively repudiated the idea that the lieu selection law contemplated the issuance of scrip. See 28 L. D., 472.

In the following court cases the Act of June 4, 1897, is spoken of as an exchange act:

Hyde vs. Shine, 199 U. S., 62, at 80 and at 82.

United States vs. Conklin, 177 Fed., 55, at 58:

> "The Act of Congress approved June 4, 1897, which provides for an exchange of lands."

Pacific Livestock Company vs. Isaacs, 96 Pacific 460, at 464: "But in its essence it is a mere exchange of lands."

An exchange is a *mutual grant* of equal interests. See Windsor vs. Collinson, 52 Pacific, 26, at 27; Harlin's Heirs vs. Eastland, 3 Kentucky (Hardin), 590, at 593; Speigle vs. Meriwith, 22 Federal Cases 910, at 911; Wilcox vs. Randall, 7 Barb., 633, at 638; Hartwell vs. Devault, 32 Northeastern, 789, at 791; Long vs. Fuller, 21 Wis., 121, at 123.

An exchange is an executed contract. Preston vs. Keene, 39 U. S. 133.

In the case of W. E. Moses Land Scrip & Realty Company, *supra*, Lessieur vs. Price, 12 Howard 59, at 74, is given as authority for the following:

> "The rights in things exchanged usually vest at the same point of time."

In the case of Brennan vs. Ford, 46 California 7, the Court holds:

> "When a contract for the mutual exchange of lands contains no provision from which it can be inferred that one conveyance was to precede the other, the law implies that the conveyances are to be made concurrently."

In view of the above authorities, did the Land Department err in construing the act of June 4, 1897, as an offer of exchange?

> "While the decisions of the Land Department are not binding on the courts, they should not be overruled except where they are clearly erroneous." Hastings & Company vs. Whitney, 132 U. S. 357.

In Leonard vs. Lennox, 181 Federal, 760, at 763, Judge, now Justice, Van Devanter says:

> "To entitle one to a patent, it is essential, among other things, that he comply with all of the requirements of the statute under which he seeks the title and the authoritative regulations of the Department thereunder."

On page 764 he says:

> "Courts take judicial notice of the regulations of the Land Department, and when required to pass upon the existence of a particular regulation, as when ascertaining any other fact of which they take judicial notice, may resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first that which is most appropriate."

The plaintiff, prior to March 3, 1905, does not allege compliance with the regulations of the Land Department,

particularly paragraphs 15 and 16 of the circular of June 30, 1897, *supra*, nor does he give any excuse for non-compliance with said regulations. He admittedly, although warned by regulations and decisions, did not do enough to set the machinery of the Land Department in motion to get an adjudication in his case. No person can expect to get public lands without taking the formal steps required by the Land Department to place the case before it for an adjudication, any more than he can expect to get justice in the courts unless he complies with the formal requirements. In lieu of an adjudication he alleges that no objection was made to his deed and abstract of title.

In the case of Wisconsin Central Railroad Company vs. Price County, 133 U. S., 496, at 511, this Court says:

> "The agent of the State made the selections, and they had been properly authenticated and forwarded to the Secretary of the Interior, but that officer never approved of them. *Nor can such approval be inferred from his not formally rejecting them.*"

In the case of Cosmos Exploration Company vs. Gray Eagle Oil Company, 190 U. S., 301, this Court says:

> "The selector has not acquired title simply because he has selected land which he claims was, at the time of selection, vacant land open to settlement; nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent to such land. These assertions may or may not be true."

The Land Department and the courts have uniformly decided, with one exception, the case of Arizona vs. Perrin, 83 Pac. 361, mentioned later, that the approval of the deeds, adjudication of the character of the base and lieu land, and approval of the selection are necessary to pass the equitable and legal title of the base land to the United States and the equitable and legal title to the lieu land to the selector and to complete the contract of exchange.

In the case of Cosmos Company vs. Gray Eagle Company, *supra*, page 312:

> "There is nothing in the Statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the Act; and unless those officers had that power they did not acquire it by assuming to exercise it."

Page 313:

> "Under the rule above cited, that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it."

The United States Circuit Court for the District of Oregon, on November 28, 1909, in the case of United States vs. McClure, 174 Federal, 510, had occasion to decide whether the United States could bring an action for the cancellation of a patent procured by fraud later included within the limits of a national forest, which the holder of the patent had attempted to relinquish to the United States under the terms of the Act of June 4, 1897, without having made a lieu selection. The defendant's plea was that the United States was not damaged and could not maintain the action, because the title was in the United States and a judgment canceling the patent would accomplish nothing.

(This is similar to the successful defense in the case of United States vs. Conklin, 177 Federal, 55.)

The Court, however, held (page 511):

> "No method of procedure for effecting the exchange is provided by the law. The general administration of the forestry reservation act, however, and the adjudication of the forest questions arising thereunder are vested in the Land Department. It has the power and authority to adopt, and has adopted, rules and regulations governing the procedure in relinquishing lands within a reservation, and the selection of other lands in lieu thereof, of which the courts will take judicial knowledge. Cosmos vs. Gray Eagle, 190 U. S., 301."

> "By the rules and regulations so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate of patent has issued, is required to make a quit claim deed to the United States for the land offered in exchange for it, record it in the proper county, and file the same, accompanied by an abstract of title duly authenticated, showing a chain of title from the Government back to the United States to the property offered, in the local land office, and at the same time designate the particular tract which he desires in lieu of that relinquished. 30 L. D., 180, Rule 16; W. L. Tevis, 29 L. D., 575."

> "But the title does not pass to the land offered in exchange until the deed is accepted. The mere execution and recording of the deed and the tender thereof vests no title in the Government until the deed and title are examined and approved. It is a mere assertion by the applicant of his title and right to make selection. Cosmos vs. Gray Eagle, *supra;* C. W. Clark, 32 Ld., 233; W. E. Moses Land Scrip & Realty Company, 34 Ld., 460. But the equitable fee in the legal title remains in him. The deed and tender thereof amounts

> to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted, the owner of the land offered in exchange retains title thereto, either legal or equitable, and the Land Department has no authority to determine the validity of the title offered if it is defective or there is some adverse claim thereto. H. H. Goetjen, 32 Ld., 209. All it can do in such a case is to refuse to accept the deed and make the exchange. * * *
>
> "I conclude therefore that the Garland deed of relinquishment did not vest the title in the Government nor confer upon the Land Department authority to determine the question whether the patent for such land was procured by fraud, and the demurrer should be overruled."

In the case of Pacific Live Stock Co. vs. Isaacs, 96 Pacific 460, at 464, the Court says:

> "Neither party acquires any legal or equitable title in the lands proposed to be exchanged until the acceptance or final consummation thereof."

To these we may add Roughton vs. Knight, 103 Pacific, 844, and the long line of decisions in the Department of the Interior.

In the supplementary brief filed by the defendant the case of Arizona vs. Perrin, 83 Pacific, 361, is reprinted in full. The case is special in many ways. The question arises whether the State of Arizona had the right to tax certain base lands deeded to the United States by Perrin. It appears, so far as the record discloses, that the selections to the lieu lands were made, and the titles approved to most of the lands before the assessment was made. However, Perrin had entered into a special contract with the United States regarding the lands, which, whether legal or not at

the time it was entered into, was adopted and ratified by the Act of March 3, 1905, which excepts and saves contracts entered into by the Secretary of the Interior. The whole basis of the decision is (see reprint page 6 of brief):

> "It will be observed that the act itself makes no provisions as to the manner in which the relinquishment to the Government shall be made. The whole subject is left under the control of the Land Department of the Government."

The court goes on to say that the act does not require that the base land and the lieu land vest at the same time. In regard to the specific case, because of the special contract requiring the deeding to the United States of the base lands and permitting Perrin to select lieu lands, the rule is different, since the contractual obligation was entered into before the lands were deeded to the United States, and since the deeds were filed in accordance with the terms of the contract, the Secretary of the Interior had consented in advance to receive the titles, so that title passed subject to be divested only if the titles proved bad. Arizona vs. Perrin, *supra*, is not in point in the present cases, because there is in that case a special contract which required a special interpretation. The most the case holds is that the act was placed within the control of the Land Department absolutely, and the Secretary of the Interior had the right to contract when the title shall vest. The plaintiff in this case does not allege any special contract; so the ordinary rule would seem to be applicable—that is, that the plaintiff must comply with the law and the regulations.

According to the above decisions, the Act of June 4, 1897, is an offer of a unilateral contract requiring full compliance on the part of the offeree before any obligation arises on the part of the offeror.

II.

The Act of March 3, 1905, 33 Stat., 1264, repeals the Forest Lieu Act of June 4, 1897, 30 Stat., 34, and rejects all uncompleted attempts or proposals to comply with said Act, with the three exceptions spoken of in the repealing Act. The power of Congress over public lands is plenary, and the Land Department has no authority to accept selections after March 3, 1905, not within the exceptions in the repealing act.

In the case of W. E. Moses Land Scrip & Realty Company, *supra*, page 460, the Secretary says:

> "The Act of March 3, 1905, repeals not merely the invitation of private owners to relinquish their lands, but all other provisions looking to an exchange."

Page 461:

> "Under the Act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated, and it is simply a purpose in the private owner's intent."
>
> "A proposal may be withdrawn at any time before acceptance. That the Act of March 3, 1905, was a withdrawal of the proposal of exchange hardly admits of question. Were it not so intended, the proviso is wholly unnecessary. If it was intended that selections might be made to satisfy all relinquishments of land made with intent in future to make selections, then it was unnecessary to permit the perfecting of incomplete selections actually made, or to permit reselections upon bases assigned in previous ones that failed without the selector's fault. The proviso necessarily implies that Congress intended to withdraw its general proposal of exchange and to limit the power over the subject of disposals of public lands, and the

> Land Department is without authority to dispose of public lands unless granted by Congress. If it assume to do so, patents to land issued without authority of law would be mere nullities conveying no title."

In the case of Roughton vs. Knight, 103 Pacific, 844, at 845 the Court says:

> "It is admitted that the plaintiff was not within the exceptions contained in the repealing act, because he had no pending selection, nor did he have any written contract with the Secretary of the Interior."

It would be futile to argue that on March 14, 1905, the plaintiff acquired any right by filing the papers which he alleges he did, which would have initiated an exchange had they been filed before March 3, 1905. The Department of the Interior could take no action on those papers unless the plaintiff shows that the Act of March 3, 1905, is a mere nullity and should have been disregarded by the Interior Department. The exceptions in the repealing Act forbade any construction that Congress desired to make other exceptions by implication, and, since the Act was a positive repeal, the jurisdiction of the Interior Department *ended on March 3, 1905*, so far as the plaintiff was concerned, he not having alleged that he is within one of the exceptions.

The most that the plaintiff can show, under the decisions, is that he has clouded his title by deeding the base land to the United States, and that there is no authority on the part of the United States to aid him, since Congress has as yet passed no remedial legislation. At the most, therefore, there is a moral obligation only on the part of Congress to act. The matter has been before Congress several times, and once, in response to Senate Resolution of March 19, 1906, the Secretary of the Interior issued a circular,

35 L. D. 8, calling for information in regard to such cases.

In the case of W. E. Moses Land Scrip & Realty Company, *supra*, at page 461, the Court says:

> "The argument based upon the supposed hardship and injustice of withdrawing the proposal as to lands relinquished before the date of the repealing act is one proper to be addressed to Congress, not to the Land Department, which has no longer any power to allow an exchange, nor yet power to reconvey the title to the relinquished land, if that vested by record of the deed of relinquishment. Congress has the matter under consideration in various bills now pending before it. This refutes the charge of injustice. No doubt Congress will afford a remedy proper in the case."

See also the case of William S. Tevis, *supra*, at 577.

III.

The most claimed by the plaintiff is an inchoate right to select. Such a right, when recognized, is only a float until selection is definitely made and approved, and until such approval Congress cannot be presumed to have parted with its power to dispose of the land.

(The italics in the following quotations are ours.)

The most the plaintiff alleges that he has obtained by reason of his deed to the United States is a right to select lieu land. In the case of Wisconsin Central Railroad Co. vs. Price County, 133 W. S., 496, at 512, this Court says:

> "Until the selections were approved, there were no selections in fact; only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might have been taken as indemnity were incapable of identification; the proposed selections remained the

> property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost for the causes mentioned, but such promise passed no title and until it was executed, *created no legal interest which could be enforced in the courts.* The doctrine, that until selection is made no title vests in any indemnity lands, has been recognized in several decisions of this Court."

See also Sjoli vs. Dreschel, 199 U. S., 564, and Sioux City & St. Paul Railroad Company vs. Chicago, Milwaukee & St. Paul Railroad Company, 117 U. S., 406.

The decision of this Court in Frisbie vs. Whitney, 9 Wall., 187, that:

> "A party by settlement upon lands of the United States, with a declared intention to obtain a title to the same under the preemption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to make other disposition of them."

has been generally followed.

In the Yosemite Valley case, Hutchins vs. Lowe, 15 Wall., 77, this Court held, in a similar case, at page 91:

> *"The hindrance of the complete performance of everything required of the claimant could not impair his rights."*

In regard to the contention that a settlement right gave a vested right to the land settled upon, this Court said (page 86):

> *"It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control* by mere settlement of a party with declared intention to purchase *could be attributed to its legislation."*

In the case of Rancho San Rafael, 4 L. D., 482, Secretary Lamar (afterwards Justice of this Court) said:

> "Uncertainty would cloud every *inchoate title* and, in many instances, *vested rights* would be endangered."

In the case of Campbell vs. Wade, 132 U. S., 34, cited and followed in the case of Telfener vs. Russ, 162 U. S., 174, this Court held that before any act withdrawing lands from sale can be held to impair any vested right of an applicant for purchase, he must have done everything required by law to secure such right. Until then, no contract right of the applicant is violated by such legislation.

In the first case, the applicant had not done enough to acquire a vested right; in the second case, he had done enough.

We have shown that the plaintiff never acquired the right to select, because he did not make his selection before March 3, 1905. But plaintiff claims nothing more than an inchoate right to select, which he claims was prejudiced by the Act of March 3, 1905. The courts, however, make a distinction between inchoate rights and vested rights to public land. Before March 3, 1905, the plaintiff had never signified his intention to select any particular tract of land. On March 3, 1905, Congress withdrew its invitation; also took away any alleged rights under the terms of the Act of June 4, 1897, unless expressly accepted. The plaintiff, never claiming any more than an inchoate right, never had a vested right.

The Act of March 3, 1905, therefore, even if plaintiff's contention were allowed to stand, did not deprive him of any vested right; but only, as he claims, an inchoate right.

IV.

The Defendant's Alleged Errors Answered Specifically.

In summing up the foregoing, we have concluded to answer specifically the four main points made by the briefs filed by the plaintiff's attorneys:

First, *whether the plaintiff on June 19, 1899, accepted the offer in the Act of June 4, 1897:*

The plaintiff only alleges that he filed a deed of relinquishment and an abstract of title; that is all. The regulations required that a selection be made as well. It also required evidence as to the non-mineral character of the base land and lieu land, and evidence as to whether the lieu land was of such character that it could be selected under the Act. The Act as interpreted by the Department was an offer of a unilateral contract. In the special case of the San Francisco National Mountains National Forest, special contracts were made where, under an interpretation of the Arizona Supreme Court, the title to the base land passed by virtue of these contracts the moment the deeds were filed, subject only to be divested by the Secretary of the Interior.

The plaintiff alleges no special contract, or no reason why the ordinary regulations and rulings should not apply to him.

Second, *whether the filing of the deed of relinquishment and the abstract of title on June 19, 1909, gave the plaintiff a right to select lieu lands that Congress could not divest, and that the Act of March 3, 1905, so far as it attempts to take away that right, is unconstitutional:*

The Land Department has specifically repudiated the idea that the Act of June 4, 1897, permitted the issuance of scrip, which is, in its essence, the thing claimed by the plaintiff. The sole claim of the plaintiff is an inchoate right

to select lands, which is not such a right to the public lands that it cannot be divested. Any other ruling would considerably impair the authority of Congress over the public lands, and prevent it from making the necessary Government use of the lands and from disposing of them in accordance with the best public interests. It would be a startling doctrine that Congress could not legislate, under Article IV, Sec. 3 of the United States Constitution, for fear of hampering inchoate rights to public lands.

Third, *whether on March 14, 1905, the plaintiff became entitled to the issuance of patent to the lieu land and became the equitable owner of it:*

The plaintiff must first show that the Act of March 3, 1905, is a nullity, or that his particular case was protected by one of the exceptions in the Act. Congress has plenary power over the public lands, and the Secretary of the Interior was powerless to take favorable action upon an application made after the passage of the Act of March 3, 1905, and not within one of the exceptions.

Fourth, *whether the defendant's knowledge of all the matters alleged in the complaint, made him the trustee for the plaintiff, and under duty to convey to the plaintiff:*

The complaint alleges matters of equity only. The legal rights have been concluded by the issuance of patent to the defendant. The plaintiff must show that the defendant had notice of his prior *equitable* rights. He is then charged with notice to the extent of those equities. (Wilson vs. Mason, 1 Cranch., 45.)

The defendant knew the legal titles had not passed. To hold him a trustee it must be shown that, since this is an agreement of exchange, that he knew the equitable titles had passed. It is nowhere stated in the complaint when the defendant lost equitable control of the base land. In an exchange he is presumed to retain it until he gets an equi-

table title to the lieu land. They should vest at the same time. If a trust is to charge with reasonable certainty (Brace vs. Reid, 3 Greene [Ia.], 42), the plaintiff has failed to show a trust relationship on the ground of notice of prior *equities.*

In Roughton vs. Knight, the case at bar, the Supreme Court of California held:

> "There is no theory by which the duty of the Commissioner of the General Land Office to approve the plaintiff's selection, if any existed, could be transferred to the defendant; and unless the defendant can be charged with the responsibility for the omission of the Commissioner to perform such duty, if there was one, there can be no trust which the defendant is bound to execute."

To hold the defendant a trustee for the plaintiff, he must allege that the action of the United States amounted to a double sale of the land, first to the plaintiff and then to the defendant. (Carroll vs. Safford, 44 U. S., 3 How., 441, at 460.) The defendant would then be charged as a trustee, provided he had notice.

The sole duty violated by the United States in such cases is the execution of a conveyance to the proper party.

> "To charge the holder of a legal title under patent from the United States as a trustee for another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to a patent from the Government. * * * It is not sufficient to show that there may have been an error in adjudging the title to the patentee. It must appear by the law properly administered that the title should have been awarded to the claimant." Bohall vs. Dillon, 114 W. S., 47, 51.

V.

The complaint does not state facts sufficient to constitute a cause of action.

In the case of Marquez vs. Frisbie, 101 U. S., 473, it was held:

> "Where, however, there is a mixed question of law and fact, and the court cannot separate it so as to ascertain what the mistake of law is, the decision of that department, affirming the right of one of the contesting parties to enter a tract of land, is conclusive."

The defendant in this case is not concluded in his pleading by a demurrer to the complaint. He may answer. If the Superior Court of Kern County finally adjudicates the case in favor of the plaintiff, it must find not only the four legal points in the plaintiff's favor, but must also find:

First, that the plaintiff *initiated* his claim to the lieu land before the defendant; second, that both the base land and the lieu land are non-mineral; third, that the lieu land was unoccupied at the time of the attempted selection by the plaintiff; fourth, that the plaintiff owned the base land; fifth, that the base land was in the limits of a forest reserve; sixth, that the title to the base land is satisfactory to the United States; seventh, that the conveyance is sufficient in form to pass title to the United States.

In the single question of priority to the lieu land, there is absolutely no averment except that the plaintiff initiated *his* right to the land March 14, 1904, and the defendant received a *patent* November 15, 1907.

The proof of mineral character before the Land Department is material. See Leonard vs. Lennox, 181 Fed. Rep., 760.

> "And that the Department can adopt regulations to determine the mineral character of the land, is not open to question."

See same case, page 766, with cases cited.

The plaintiff has not shown that he was vigilant in protecting his rights. He did not comply with the rules and regulations of the Department, and for over five and one-half years allowed his record to remain in the Land Department, unacted upon and uncompleted. There was ample machinery and opportunity to protect his rights in the Land Department, which he failed to take advantage of. If one of two innocent parties must suffer by the passage of the Act of March 3, 1905, should it be the plaintiff, who took no steps to protect his interests, or the defendant, who merely took the title after proceedings in the Interior Department, which had closed all action on the plaintiff's case?

The plaintiff had sufficient opportunity to have his case adjudged in the Department, so that all questions of fact could have been determined by that Department, and if it had mistaken the question of law the courts could have determined this, without having to try the questions of fact raised in the complaint.

Conclusion.

We have refrained from quoting cases where fraud in the patentee is alleged. This case presents no such problem. The case is one which purports to involve solely an erroneous construction of law by the Land Department and there are no questions of fact to determine. The Courts hold in such cases that the duty of the Land Department to issue legal title to the one actually entitled is

conveyed with the patent to the patentee. The plaintiff's complaint, however, is still to be decided on its merits. If the courts are open to those who fail properly to present their cases to the Land Department, what integrity is there in a United States patent?

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

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